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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL CHAMBER ALLIANCE FOR POLITICS, ET AL.,
Petitioners,

v.

FEDERAL ELECTION COMMISSION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED*

1. Whether persons aggrieved by certain unambiguous and mandatory provisions of the Federal Election Campaign Act, as amended, may maintain an action to obtain judicial review of the constitutionality of those provisions without first exposing themselves to the risk of civil and criminal prosecution for violations of those provisions?

2. Whether persons aggrieved by certain unambiguous and mandatory provisions of the Federal Election Campaign Act, as amended, may maintain an action to obtain judicial review of the constitutionality of those provisions without first seeking an advisory opinion concerning explicit speech which is clearly proscribed?

3. Whether the special judicial review provisions contained in the Federal Election Campaign Act, as amended, and the prudential policies which they subserve, must be considered in determining whether persons aggrieved by unambiguous and mandatory provisions of the Act may maintain an action to obtain judicial review of the constitutionality of those provisions?

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*Parties to the proceedings below were:

Plaintiffs-Appellants (Petitioners here): National Chamber Alliance for Politics, Chamber of Commerce of the United States of America, Richard L. Lesher, John A. Kochevar, Fred Radewagen, and Robert A. Roland.

Defendants-Appellees (Respondents here): Federal Election Commission, and each of its six Commissioners named in their official capacities.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated May 8, 1980, is as yet unreported, and is reproduced herein as Appendix A. The orders of the court denying a petition for rehearing and rehearing *en banc* are reproduced herein as Appendices B and C. The memorandum opinion and order of the United States District Court for the District of Columbia, rendered on November 22, 1978, are unpublished and appear herein as Appendix D.

JURISDICTION

The Court of Appeals for the District of Columbia Circuit issued its judgment on May 8, 1980. On June 10, 1980, the court denied Petitioners' timely filed petition for rehearing and rehearing *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. § §1254 and 2101(c).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Constitution, Article III

2 U.S.C. §437f

2 U.S.C. §437g

2 U.S.C. §437h

2 U.S.C. §441b

11 C.F.R. §114.7(j)

STATEMENT OF THE CASE

The Petitioners in this action, the National Chamber Alliance for Politics (the "Alliance"), the Chamber of Commerce of the United States of America (the "Chamber"), and four individuals eligible tc vote for the Office of President of the United States, instituted this litigation on July 20, 1978, alleging that certain provisions of the Federal Election Campaign Act, as amended, 2 U.S.C. §431 *et seq.*, (the "Act"), both facially and as applied to them, limit their ability to participate fully in the political process. Specifically, they are aggrieved because the Act limits their ability to "solicit" voluntary contributions to the Alliance, an activity which is intimately and inextricably intertwined with the dissemination of their ideas, opinions, and political beliefs about matters of national concern.

The gravamen of their complaint[1] is that 2 U.S.C. §441b prohibits them from "soliciting" voluntary contributions from separate segregated funds (also referred to as "political action committees") for the Alliance, the Chamber's political action committee, although the Act specifically permits such contributions and does not prohibit certain other individuals and organizations from soliciting contributions from political committees. And, the Petitioners made part of the record below a solicitation letter (reproduced as Appendix F) whose contents typifies the communication through which Petitioners would communicate with political action committees, but for the civil and criminal penalties contained in the Act. Hence, the Petitioners' complaint alleged that §441b abridges the First Amendment guarantees of freedom of speech and assembly and also denies them equal protection of the laws in contravention of the Fifth Amendment.

The complaint sought injunctive and declaratory relief pursuant to 28 U.S.C. § §2201 and 2202, and requested expedited review of the substantial constitutional issues raised therein pursuant to 2 U.S.C. §437h, the expedited judicial review provision of the Act.[2]

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[1] Petitioners' First Amended Complaint is reproduced at Appendix E.

[2] §437h. Judicial review

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc. (cont.)

On November 22, 1978 the district judge dismissed the Petitioners' complaint, citing two grounds. First, the judge determined that the expedited judicial review provisions of 2 U.S.C. §437h were inapplicable to the plaintiffs since the literal words of §437h(a) refer specifically to the Federal Election Commission, the national committee of any political party, or any individual eligible to vote for the Office of President. The court reasoned that the expedited review provisions were not on their face applicable to the Alliance or to the Chamber, nor were they applicable to the individual plaintiffs since, "[t]hey sue not in their individual capacities but rather to vindicate the rights of the corporate entities." (App. D at 41a).

Second, the district court determined that Petitioners presented "no case or controversy sufficiently ripe for decision by a federal court" since the Federal Election Commission had not explicitly threatened to enforce the statutory prohibition (with its attendant civil and criminal sanctions) contained in §441b against the Petitioners. (App. D at 41a).

On November 29, 1978, Petitioners noticed their appeal to the United States Court of Appeals for the District of Columbia Circuit. For purposes of briefing and argument, Petitioners' case was consolidated with a separate action brought by the Martin Tractor Company

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(b) Nothwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

and others which challenged *other* substantive provisions of §441b, alleging, *inter alia,* violations of the First and Fifth Amendments not brought in issue by Petitioners here. Significantly, the plaintiffs in *Martin Tractor*, unlike the Petitioners here, also alleged that §441b failed to define the term "solicitation" and thus was unconstitutionally vague.

In an opinion dated May 8, 1980, a two judge panel of the court of appeals affirmed the district court's finding with respect to ripeness, and thus determined that it was unnecessary to reach the issue of the applicability of 2 U.S.C. §437h. (App. A at 37a).

The court grounded its ripeness decision on three factors: first, that the Petitioners did not threaten to commit a statutory violation; second, that the Petitioners did not seek an advisory opinion[3] to determine the legality of the conduct in which they would otherwise engage; and, third, that the Commission has taken no action to enforce the statute against the Petitioners. (App. A at 34a-35a). In so holding, the court expressed its view that the statute contained a "crucial ambiguity" which "inheres in the word 'solicit' " (App. A at 34a n.59), thus militating in favor of Petitioners' seeking some further interpretation of the statute and regulations from the Federal Election Commission.

Believing that the court both misapprehended the nature of Petitioners' case and misread the applicable law, Petitioners sought a rehearing and suggested a rehearing *en banc.* On June 10, 1980, the court of appeals denied Petitioners' motion, thereby necessitating the instant petition.

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[3] *See* 2 U.S.C. §437f.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that there are three compelling reasons why this Court should grant their Petition.

First, the decisions below conflict with the recent teachings of this Court, and the lower federal courts, that a person need not expose himself to prosecution in order to vindicate important constitutional rights. *Buckley* v. *Valeo,* 424 U.S. 1 (1976); *Steffel* v. *Thompson,* 415 U.S. 452 (1974); *International Society for Krishna Consciousness* v. *Eaves,* 601 F.2d 809 (5th Cir. 1979); *International Society for Krishna Consciousness* v. *Rockford,* 425 F. Supp. 734 (N.D.Ill. 1977), *aff'd in part, rev'd in part,* 595 F.2d 263 (7th Cir. 1978). In so doing, the decisions below effectively reverse almost 30 years of "modern case law. . . which reflects a greater judicial willingness to aid litigants faced with the necessity of risking substantial harm in order to challenge the validity of governmental action." *Joseph* v. *U.S. Civil Service Commission,* 554 F.2d 1140, 1152 (D.C. Cir. 1977). *See Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967). And uniquely in this case, Petitioners should not be required to violate a law whose manifest purpose is to preserve the integrity of the electoral process as a means of testing the boundaries of the First Amendment. *Cf.*, *Buckley, supra* at 14.

Second, requiring Petitioners to first seek an advisory opinion from the Commission as to whether a clearly defined course of conduct is permissible under the Act, when the Commission, by interpretative commentary, has already proscribed such conduct, violates a clearly established exception to the doctrine of the exhaustion of administrative remedies and frustrates the congressional intent underlying 2 U.S.C. §437h.

Third, insofar as the decisions below are predicated upon prudential considerations, the failure of the lower courts to consider the import of 2 U.S.C. §437h, which specifically provides for expedited judicial review of challenges to the constitutionality of the Act, frustrates both the express intent of Congress and the significant policy considerations which underlie the enactment of that provisions. *Broad Political Action Committee* v. *FEC*, 591 F.2d 29 (7th Cir. 1979).

I. The Explicit Speech in Which Petitioners Would Engage, But For the Civil and Criminal Penalties Contained in the Act, Is Protected by the First Amendment.

Petitioners seek to vindicate their fundamental constitutional right to engage in political speech and debate, a right which they would exercise in the context of a specific request for voluntary contributions to be used for political purposes as permitted by the Federal Election Campaign Act, as amended. These solicitations would be directed to separate segregated funds, all of which are subject to the contribution limitations[4] and disclosure requirements[5] of the Act. Such solicitations, however, are unequivocally prohibited by the Act itself,[6] the regulations promulgated by the Federal Election Commission pursuant to the Act,[7] and the interpretative

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[4] 2 U.S.C. §441a(a)(2)(C).

[5] 2 U.S.C. §434.

[6] 2 U.S.C. §441b(b)(4).

[7] 11 C.F.R. §114.7(j)(1979) provides:

A membership organization, *including a trade association*, cooperative, or corporation without capital stock or a separate segregated fund established by such organization *may not solicit contributions from the separate segregated funds established by its members*. The separate segregated fund established by a membership

commentary which the Commission published contemporaneously with the regulations.[8]

The speech in which Petitioners desire to engage, and in which they would engage, but for the civil and criminal penalties contained in the Act, was clearly and precisely set forth for the courts below. Petitioners made part of the record below a sample solicitation letter (App.F) which is presently being used to solicit voluntary contributions from individuals, subject to the prohibitions and limitations contained in the Act,[9] and which they would use in a solicitation directed to political action committees. In this letter the Petitioners speak of the value of "economic freedom" and express their belief that "the government is applying additional restrictions" which have eroded "essential freedom,"

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organization, including a trade association, cooperative, or corporation without capital stock, may, however, accept unsolicited contributions from the separate segregated funds established by its members.(Emphasis supplied.)

[8] The explanatory text prepared by the FEC at the time the regulations were proposed, and which accompanied the regulations when they were transmitted to Congress pursuant to 2 U.S.C. §438(c), specifically states:

> Subsection (j) prohibits a membership organization, cooperative, or corporation without capital stock or a separate segregated fund established by such organizations from soliciting contributions from separate segregated funds established by its members. This subsection is based on the statute which extended the solicitation right to members or to the stockholders and executive or administrative personnel of corporate members only. *This prohibition applies equally to membership organizations which are trade associations and would prevent a trade association or its separate segregated fund from soliciting contributions from separate segregated funds (political committees) established by its corporate or noncorporate members.*

Federal Election Regulations, Communication from the Chairman, Federal Election Commission, H. Doc. No. 94-573 (94th Cong., 2d Sess.) at 110 (Emphasis supplied).

[9] 2 U.S.C. §441b(b)(4)(D).

and conclude that support for the Alliance by voluntary contributions provides a means for ensuring that this freedom will be protected. (App. F at 56a-58a.)

That such a discussion of socio-economic and political philosophy is inextricably intertwined with a solicitation for funds was recently reaffirmed in *Village of Schaumberg* v. *Citizens for a Better Environment,* _____U.S._____, 63 L. Ed. 2d 73 (1980). In striking down a licensing requirement which would have prohibited a not-for-profit corporation organized for the purpose of protecting, maintaining, and enhancing the enviroment, *id.*, at 80, from soliciting contributions, this Court noted:

> . . . solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and. . . without solicitation that flow of such information and advocacy would likely cease.

Id. at 84.[10]

Nowhere is the free flow of this exchange of information and beliefs more important than in the political arena. Indeed, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect free discussion of governmental affairs. This, of course, includes discussion of candidates, structures and forms of government, the manner in which government is operated, and all such matters relating to the political processes." *Mills* v. *Alabama,* 384 U.S. 214, 218-219 (1966)

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[10] Thus, the Court simply reaffirmed "[o]ur cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money, *New York Times Co.* v. *Sullivan.*" *Village of Schaumberg, supra,* 63 L. Ed. 2d at 85 (citations omitted).

Petitioners respectfully suggest that the issue in this case touches upon the core meaning of First Amendment principles and values, and presents an "extraordinary case"[11] which meets both the judicial and prudential considerations embodied in Article III.

II. The Decisions of the Courts Below Conflict with the Teachings of This Court, and Other Federal Courts, which Support a Determination that A Justiciable Case Is Present Here.

A. Petitioners need not expose themselves to substantial civil and criminal penalties in order to vindicate important constitutional rights, nor should they be required to do so.

This Court need look no further than its holding in *Buckley* v. *Valeo,* 424 U.S.1(1976), to determine that the courts below have undermined the fundamental constitutional principles of justiciability embodied in that opinion. In *Buckley*, individuals and organizations, the plaintiffs and intervenor-plaintiffs, sought both declaratory and injunctive relief in their broad-sweeping challenge to the Federal Election Campaign Act, as amended in 1974. In finding that a justiciable controversy within the meaning of Article III was present, this Court stated that, "at least some of the appellants have a sufficient 'personal stake' in a determination of the constitutional validity of each of the challenged provisions to present 'a real and substantial controversy admitting of specific relief. . .' " 424 U.S. at 11-12.

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[11] *Buckley* v. *Valeo,* 519 F.2d 817, 833, *aff'd in part, rev'd in part,* 424 U.S. 1 (1976)

Thus, the Court looked directly to the substantial constitutional issues raised by the plaintiffs in determining that the requirements of Article III were met. And, significantly, the Court made no reference either to whether any of the plaintiffs or intervenors had violated or threatened to violate the Act or to whether the supervisory officers charged with enforcement of the Act had in fact threatened enforcement against the specific plaintiffs.

Petitioners respectfully submit that they stand in an identical posture to the plaintiffs in *Buckley*. As demonstrated above, substantial constitutional issues are at stake in the instant case. Indeed, Petitioners have described their desired conduct with specificity, the conduct is expressly prohibited by statute, regulation, and the Commission's own interpretation, and the Commission has not disputed these contentions.

Moreover, Petitioners, a trade association, its political action committee and individuals who support and desire to act in concert with those organizations are uniquely situated to press the claims affecting the ability of such persons to engage in solicitations. As a constitutional matter, then, no one other than the Petitioners, or someone similarly situated, would have the requisite stake in the controversy to permit judicial review. *See Warth* v. *Seldin,* 422 U.S. 490, 498-501 (1975).

Furthermore, this Court's disposition of the Article III question in *Buckley* is consistent with other holdings of this Court and the lower federal courts—and the holdings of the courts below conflict with these precedents.

First, it is well established that, "[i]t is not necessary that [a party] first expose himself to actual ar-

rest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel* v. *Thompson,* 415 U.S. 452 (1974).[12] And, as the Fifth Circuit recently noted, "there is clear Supreme Court authority that the probability of enforcement is not relevant to a court's jurisdiction over an anticipatory challenge." *International Society for Krishna Consciousness* v. *Eaves,* 601 F.2d 809, 818 (5th Cir. 1979). *See International Society for Krishna Consciousness* v. *Rockford,* 425 F. Supp. 734 (N.D. Ill. 1977), *aff'd in part, rev'd in part,* 595 F.2d 263 (7th Cir. 1978.)

Second, the notion that an action for pre-enforcement review is not ripe until agency enforcement has taken place simply has not been the law since *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967). The two-fold test enunciated in *Abbott,* fitness of the issues for judicial review and hardship to the parties of withholding consideration, *id.* at 151, is patently met here.

As previously noted, the speech in which Petitioners would engage, but for the civil and criminal penalties contained in the Act, is clearly set forth, and, there is no need for any judicial fact-finding of the type contemplated by the appellate court below[13] concerning the nature of these "solicitations." Thus, the first test of *Abbott* is met.

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[12] Accord: *Linmark Ass'n, Inc.* v. *Willingboro,* 575 F.2d 786 (3rd Cir. 1976), *rev'd* 431 U.S. 85 (1977)(No claim that the ordinance had resulted in any actual or specific loss and no claim of threatened enforcement. 535 F.2d 792); *Epperson* v. *Arkansas,* 393 U.S. 97 (1968) There is no record of any prosecutions in Arkansas under the statute at issue. *Id.* at 101-102.); *Adler* v. *Bd. of Education,* 342 U.S. 485 (1952)(No claim that plaintiffs had engaged or intended to engage in prescribed activity).

[13] *See* App. A at 34a n.59.

In addition, withholding judicial review works a special hardship on Petitioners and all other persons, who, although they believe that their constitutional freedoms are being infringed, are unwilling to risk serious civil and criminal penalties for testing their constitutional rights, as well as risking the loss of public confidence both in them and the electoral process. *See Abbott, supra* at 152-153. Thus, what the courts below have effectively done is frustrate this Court's holding in *Abbott* and its progeny.

Third, Petitioners submit that they do have reasonable grounds to believe that the Commission would enforce the Act against them if they conducted solicitations in violation of the Act. This belief is predicated upon past enforcement actions of the Commission itself.

Most notably, in *FEC* v. *Nat'l Right to Work Comm.*, Civ. Nos. 77-2175, 78-0315 (D.D.C. April 24, 1980), the Commission instituted enforcement actions against a not-for-profit corporation for soliciting individuals whom the Commission alleged were outside the corporation's permissible group of solicitees. *Cf.*, App. A at 36a, n.62.

In *FEC* v. *CLITRIM,* No. 79-3014 (2d Cir. Feb. 5, 1980), the commission brought an enforcement action against an unincorporated association which allegedly spent a mere $135.00 to publicize the voting record of an incumbent Member of Congress. And in *FEC* v. *AFSCME*, 471 F.Supp. 315 (D.D.C. 1979), the Commission attempted to prosecute a labor organization for publishing a cartoon related to the pardon of Richard Nixon by former President Ford.

Petitioners respectfully suggest that with such a track record of enforcement, they can reasonably be ap-

prehensive that the Commission would enforce the Act against them. And, of course, the Commission has never, in the course of this litigation, represented that it would not prosecute, or even that prosecution would be unlikely.

Thus, Petitioners suggest that, "[t]o insist that a person must break the law in order to test its constitutionality is to risk punishing him for conduct which he may have honestly thought was constitutionally protected. Not only is this prima facie unfair, but it discourages people from engaging in protected activity and enforcing constitutional rights." *International Society for Krishna Consciousness, supra,* 601 F.2d at 821.

B. Petitioners need not undertake the useless task of seeking an advisory opinion when the statute, regulations, and the Commission charged with enforcing the Act have already explicitly prohibited the activity in which Petitioners desire to engage.

As the court of appeals itself noted (App. A at 27a), the Advisory Opinion mechanism, contained at 2 U.S.C. §437f, was designed to offer a means of resolving doubts as to interpretations of the Act. With respect to the Petitioners, however, there simply is no doubt that they want to engage in political speech directed to political action committees and their representatives which is inextricably intertwined with a solicitation for funds to be used to further Petitioners' and contributors' mutual political beliefs. And, there simply is no doubt that the statute, the regulations, and the interpretative commentary of the Commission all specifically and unequivocally prohibit such speech. (See notes 6-8,

supra, and accompanying text.) Significantly, not once has the Commission even remotely suggested that the Petitioners might be in error on this point of law.[14]

The fundamental error of the court of appeals lies in its insistent application to the Petitioners here of its determination that the term "solicitation" is subject to varying interpretations, so that persons subject to the Act might not know whether particular conduct constitutes a prohibited solicitation.[15] Whatever gloss the Commission or a court may apply to the word "solicit" in other contexts, when that word is considered in the context of a statute whose unique purpose is to impose limitations upon the amount of political contributions and require the disclosure of the monetary value of political contributions and expenditures, it is axiomatic that the word "solicit" necessarily encompasses a direct request for funds.

In light of the foregoing, it would be an utterly useless task for the Petitioners to seek an advisory opi-

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[14] The Commission's only response, that the Petitioners may engage in this speech outside the context of a specific request for funds (See App. A. at 35a n.60), begs the question. First, it flies in the face of *Schaumberg, supra;* and second, except in the most exceptional cases, this Court has never permitted such a prior restraint upon speech. *Cf.*, *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 363 (1977) and cases cited therein.

[15] Petitioners here did *not* allege in their Complaint that the applicable provisions of the Act were void for vagueness because of a failure to define the term "solicitation." However, as noted above, this case was consolidated with *Martin Tractor Co.* v. *FEC* for purposes of argument. The *Martin Tractor* plaintiffs did make such allegations of vagueness in their complaint with respect to the course of conduct in which they would engage but for the civil and criminal penalties contained in the Act. Without commenting upon the merits of their claim, Petitioners here simply reiterate that the vice of vagueness is not applicable to the conduct in which they would engage.

nion from the Commission, since the answer has been foreordained. Thus, apart from the fact that "the law never requires an idle thing to be done", *Brooklyn Life Insurance Co.,* v. *Dutcher,* 95 U.S. (Otto) 269, 272 (1877), requiring the Petitioners here to exhaust this administrative remedy as a precondition to judicial review would place the court "in no better position later than [it is] now to decide the case." *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 145 (1974).

That requiring the Petitioners to seek an advisory opinion is to require a useless task is further demonstrated by reference to §437f. This provision prohibits the Commission from issuing an opinion unlesss the applicable rule of law is stated either in the statute or by regulation. As previously noted, both the statute and the regulations unequivocally set forth the prohibition complained of here, and the Commission simply cannot, even if it were so inclined, contradict its own organic statute and its own regulations in an advisory opinion.

Furthermore, even if these impediments did not exist, the interpretative commentary issued by the Commission when the regulations were promulgated provides the Petitioners with an unfavorable answer to any question which they might otherwise pose in an advisory opinion request. And, it is well established that courts "have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency." *General Electric Co. v. Gilbert,* 429 U.S. 125, 143 (1976), quoting *United Housing Authority Foundation, Inc.* v. *Forman,* 421 U.S. 837, 858-859 n. 25 (1975); *Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86, 92-96 (1973).

III. The Express Language and the Congressional Intent Underlying the Enactment of 2 U.S.C. §437h Are Frustrated by the Decisions of the Courts Below.

By imposing upon the Petitioners the Hobson's Choice of either knowingly violating a statute with civil and criminal penalties or undertaking a useless administrative act, the courts below have failed to come to grips with the fundamental procedural question which underlies the manner in which Petitioners' case should be litigated.

Petitioners sought certification of this case pursuant to 2 U.S.C. §437h, the expedited review provisions of the Act. As the Seventh Circuit has recently stated, the manifest intent of that provision is "to allow speedy judicial review of all possible constitutional challenges to any provision of the Act and to make certain that such challenges would be decided by the Supreme Court." *Bread Political Action Committee* v. *FEC*, 591 F.2d 29, 33 (7th Cir. 1979).[16]

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[16] That Petitioners here are entitled to invoke 2 U.S.C. §437h is beyond dispute. In *Buckley, supra*, this Court first utilized §437h procedures and made them applicable to all the plaintiffs and intervenor-plaintiffs there, both individual and institutional. In so doing, the Court stated: "It is clear that Congress, in enacting 2 U.S.C. §437h, intended to provide judicial review to the extent permitted by Art. III." 424 U.S. at 11-12. *See also, ibid.*, n.10. Thus, to the extent any person, individual or institutional, presents a justiciable case or controversy within the meaning of Article III, that person may invoke §437h procedures.

Furthermore, in *Bread Political Action Committee, supra*, the Court of Appeals for the Seventh Circuit laid the matter to rest when it concluded: "Based on the language of §437h and the overall scheme of judicial review provided in the Act, we hold that §437h applies to those plaintiffs' [trade associations and their political committees] constitutional challenge to certain provisions of the Act and that they may invoke the expedited review provisions. . . . Thus three Congres-

Thus, on the one hand, to require Petitioners to break the law and await an enforcement action under 2 U.S.C. §437g would frustrate the very purposes of both the Declaratory Judgment Act and §437h. For, not only does such a suggestion fly in the face of the considerations which underlie Article III (*see* discussion *supra* at 10-14), but it also undermines the very purpose of §437h, which is to place such constitutional adjudication ahead of all other challenges to the Act, including both constitutional and non-constitutional defenses to an enforcement proceeding. *Bread Political Action Committee, supra* at 32-33.

On the other hand, by requiring Petitioners to invoke the prudential doctrine of exhaustion of administrative remedies in the context of an advisory opinion request, the congressional intent underlying §437h is likewise frustrated. For, the legislative history of §437h makes it clear that, "under [§437] persons challenging the constitutionality of any provisions of the Act retain their right to do so *without exhausting administrative remedies.*"[17]

Thus, the courts below erred in failing to address the §437h issues raised by the Petitioners. For, had the courts below considered the import of §437h to the

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sional purposes [underlying §437h] are clear: comprehensive review, speedy review, and ultimate review by our highest court of constitutional challenges to the Act. The district court's construction that Congress intended to restrict standing to invoke §437h to the specified plaintiffs is inconsistent with these expressed purposes." 591 F.2d at 33. *See also* 591 F.2d at 36 ("In sum, the decisions in *Buckley* fully support our construction of §437h(a) and our holding that the plaintiffs in this case have standing to invoke its expedited review procedure."), and concurring opinion of Judge Tone, *ibid.*

[17] 119 Cong. Rec. H. 10330 (daily ed. Oct. 10, 1974) (remarks of Cong. Hays) (emphasis supplied).

issues raised in this case, then, and only then, would the full limits of the prudential concerns which come to bear upon Petitioners' case—and all cases raising such basic constitutional challenges to provisions of this Act—have been explored.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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September 1980

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2080

MARTIN TRACTOR COMPANY, *et al.*, APPELLANTS

v.

FEDERAL ELECTION COMMISSION, *et al.*

No. 79-1027

NATIONAL CHAMBER ALLIANCE FOR POLITICS, *et al.*, APPELLANTS

v.

FEDERAL ELECTION COMMISSION, *et al.*

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 78-1259 and 78-1333)

Argued September 19, 1979

Decided May 8, 1980

Judgment entered this date

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Stanley T. Kaleczyc with whom *Stephen A. Bokat* was on the brief, for appellants in No. 79-1027.

Mark Sullivan, III, with whom *Edward A. McCabe, John G. Degooyer* and *Louise A. Sunderland* were on the brief, for appellants in No. 78-2080.

Kathleen Imig Perkins, Attorney, Federal Election Commission with whom *William C. Oldaker*, General Counsel and *Charles N. Steele*, Associate General Counsel, Federal Election Commission were on the brief, for appellees.

Before: MCGOWAN, LEVENTHAL,* and WALD, *Circuit Judges*

Opinion for the Court filed by Circuit Judge WALD.

WALD, *Circuit Judge*:

Appellants in these consolidated appeals brought actions in district court seeking declaratory and injunctive relief from certain of the provisions of section 321 of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 441b,[1] ("FECA" or the "Act"). Their com-

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* Circuit Judge Leventhal, a member of the panel which heard oral argument in this case, died before the case was decided.

[1] Appellants in No. 78-2080, Martin Tractor Company v. FEC [hereinafter *Martin Tractor*], challenge those provisions of this section which effectively restrict the times, manner and place of "solicitation" of contributions by corporate "political action committees" ("PACs" or "separate segregated funds", *see* note 2, *infra*) of non-management employees. The core provisions challenged are contained in 2 U.S.C. § 441b(b)(4)(A) and (B) (1976):

> (4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—
>
> (i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its

plaints alleged that these provisions violate rights guaranteed them by the first and fifth amendments of the United States Constitution, insofar as they restrict "solicitation" of contributions to, and by, certain cor-

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> stockholders and their families and its executive or administrative personnel and their families . . . .
>
> (B) it shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

Appellants in No. 79-1027, National Chamber Alliance for Politics v. FEC [hereinafter *National Chamber*], challenge all those provisions of the section that purport to restrict or may restrict the solicitation of contributions by trade association PACs. This includes subparagraph 4(A) already quoted and the following additional subparagraphs:

> (C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.
>
> (D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administra-

porate and trade association political action committees ("PACs" or "separate segregated funds").[2] Appellants sought to have these claims determined under the special expedited judicial review provision of the FECA, 2 U.S.C. § 437h (1976),[3] which requires *en banc* consideration by the circuit courts of those questions of the Act's constitutionality which are certified by the district court where the complaint is filed.

The district court here certified no questions. Instead, on motion of appellees, the complaints were dismissed,[4]

> tive personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

2 U.S.C. § 441b(b)(4)(C) and (D) (1976).

[2] The challenged section of the Act speaks not of political action committees but of "separate segregated funds." For our purposes the two terms are used synonymously.

[3] The section provides as follows:

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

[4] Martin Tractor Co. v. FEC, 460 F. Supp. 1017 (D.D.C. 1978); Nat'l Chamber Alliance for Politics v. FEC, Civ. No. 78-1333 (D.D.C. Nov. 22, 1978), *National Chamber* Appendix (App.) 97-98.

the court holding that the facts of neither case presented a "case or controversy sufficiently ripe for declaratory action." The court also concluded that appellants were not among the individuals eligible to seek review under § 437h. Several were deemed not eligible because they did not fall into any of the statutorily-specified categories of eligible complainants; and others because the merits of their claims bore little or no relation to the characteristic which rendered them arguably eligible to proceed under § 437h.

For reasons that vary only slightly from those given by the district court, we find the cases nonjusticiable as a constitutional matter and inappropriate for adjudication as a prudential matter.[5] We therefore affirm the

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[5] Since we hold that these appellants present no justiciable "case or controversy" we need not decide or consider the circumstances under which a court might decline for prudential reasons alone to reach the merits of a constitutional challenge to the FECA. This court has indicated that even when a complaint is governed by the special FECA review provisions, a live "case or controversy" might be dismissed for prudential reasons. Clark v. Valeo, 559 F.2d 642, 650 n.11 (D.C. Cir.) *(en banc), aff'd mem. sub nom.* Clark v. Kimmit, 431 U.S. 950 (1977). Judge Leventhal, concurring in *Clark*, would have rested his dismissal of that case entirely on prudential grounds. *Id.* at 657. Judge Robinson, dissenting, disagreed, *id.* at 669, arguing that Congress in the FECA and the Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), had eliminated from adjudication under § 437h the extra-constitutional aspects of "justiciability." The majority took issue with Judge Robinson's dissent:

> To the extent [Judge Robinson's] language may be read as suggesting a view that Congress may "command" the judiciary to act contrary to the rules relative to ripeness the Supreme Court has developed "for its own governance in the cases confessedly within its jurisdiction," *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 . . . (Brandeis, J., concurring), we respectfully disagree.

[Continued]

dismissals of the complaints and in view of this disposition we do not confront the issue of the scope or applicability to this case of § 437h.[6]

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[5] [Continued]
Id. at 650, n.11. We take note of the majority's position in *Clark* but since we find it unnecessary to decide the cases now before us on prudential grounds alone, we do not employ their understanding here, even assuming, *arguendo*, the judicial review provisions of § 437h applied.

[6] With respect to § 437h, the questions presented are: (1) whether the availability of judicial review under § 437h is limited to the classes of individuals or groups expressly mentioned as eligible to seek review under its terms; and (2) whether the capacity in which or the reasons for which an individual or group seeks review should determine the availability of the procedure provided in § 437h. By its own terms § 437h is available to "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States."

The district court concluded that § 437h was not open to any of these appellants. In *Martin Tractor* the court reasoned that the appellants were not "the Commission" or the "national committee of any political party" and that the individual plaintiffs put at issue ". . . not their rights as voters, but rather the constitutionality of the Act's provisions relating to communications between a corporation and its employees about voluntary contributions." 460 F. Supp. at 1019. In *National Chamber* the court concluded:

> The same factors which required dismissal of the action in *Martin Tractor* prove fatal to plaintiff's case here. The special standing provision of 2 U.S.C. § 437h(a) is inapplicable to the Chamber and its PAC as they are not among the entities enumerated in that provision. The Court's reasoning in *Martin Tractor* as to the standing of the corporate executives and hourly employees under § 437h(a) applies equally to the individual plaintiffs here. They sue not in their individual capacities but rather to vindicate the rights of the corporate entities. That derivative right was not the constitutional right of an "individual eligible to vote" which Congress considered "appro-

I. Some General Principles

A. *Principles of Justiciability*

The congeries of doctrines which together comprise the requirements of justiciability interpose an obstacle in each case between the complainant and any decision on the merits of his or her complaint. Although the "case or controversy" requirements of Article III are the foundation of the body of law from which the criteria of justiciability have been fashioned, the prudent exercise of the judicial function, especially in reviewing the constitutionality of legislative acts, has been responsible for the development of much of the edifice of the doctrine.[7]

To establish a justiciable claim under Article III, a plaintiff must allege "such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness . . . ." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Further, the plaintiff must allege an actual in-

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priate" for vindication in a declaratory judgment action under this section.

National Chamber App. at 97-98.

The district court's conclusion conflicts with the conclusion of the only other court to have faced this question squarely. In Bread Political Action Comm. v. FEC, 591 F.2d 29 (7th Cir. 1979), the seventh circuit decided that judicial review under § 437h should not be confined to suits brought by the plaintiffs designated in the statute. We intimate no view as to the correctness of that ruling.

[7] *See* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 81-82 (1978) (delineating both constitutional and prudential components of ripeness). The constitutional requirements for ripeness were stated to be equivalent to those for standing—injury in fact and redress of the injury by the relief requested. For prudential purposes the critical question was stated to be whether deferring decision would better prepare the court by providing additional facts.

jury [8] or the certainty of future injury. "A hypothetical threat is not enough." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947). If the injury be a future one, the occurrence of the injury must be reasonably certain and clearly describable for the action to be deemed "ripe" for adjudication. The mere possibility of prosecution or the possibility that sanctions authorized under a general regulatory regime may be imposed when the regulatory agency is confronted with specific facts developed in some future agency proceeding is insufficient.[9]

Ripeness enters the Article III "case or controversy" picture in the determination whether the requisite injury is in sharp enough focus and the adverseness of the parties concrete enough to permit a court to decide a real controversy and not a set of hypothetical possibilities.

As a prudential doctrine, ripeness is in part an expression of the court's inherent discretion when declaratory or injunctive relief is sought. The Court has noted the importance of this discretion when called upon to make a declaration of right, repeating its caution "against de-

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[8] In Laird v. Tatum, 408 U.S. 1, 13 (1972), the Court applied

> the established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action . . . .

Quoting Ex parte Levitt, 302 U.S. 633, 634 (1937).

[9] In Nat'l Student Ass'n v. Hershey, 412 F.2d 1103, 1110 (D.C. Cir. 1969), this court noted that:

> the mere existence of a statute, regulation, or articulated policy is ordinarily not enough to sustain a judicial challenge, even by one who reasonably believes that the law applies to him and will be enforced against him according to its terms.

See also Lion Mfg. Corp. v. Kennedy, 330 F.2d 833 (D.C. Cir. 1964).

claratory judgments on issues of public moment, even falling short of constitutionality, in speculative situations." [10]

Because of the " 'great gravity and delicacy' of [the courts'] function in passing upon the validity of an act of Congress," [11] the need is manifest for a "full-bodied record" [12] in such adjudication. *United States* v. *UAW*, 352 U.S. 567 (1957), a case which involved an alleged violation of the statutory predecessor of the provisions at issue here, emphasized the importance of a detailed factual record upon which a court might limit, frame and perhaps avoid a constitutional decision. In that case, the Court upheld the indictment of a labor organization accused of using union dues to sponsor television broadcasts supporting Congressional candidates. Finding the indictment consistent with the terms of the statute, a majority of the Court declined to consider the statute's constitutionality, observing that such challenges should not be considered "unless absolutely necessary to a decision of the case." *Id.* at 590, *quoting Burton* v. *United States*, 196 U.S. 283, 295 (1905). The indictment was remanded for trial so that "an adjudication on the merits [would]

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[10] Pub. Affairs Assoc., Inc. v. Rickover, 369 U.S. 111, 112 (1962). *Accord*, Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 243 (1952) ("the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power"); Samuels v. Mackell, 401 U.S. 66, 73 (1971) (error to declare rights with respect to pending state criminal prosecution) (principles which guide injunctive relief will also guide granting of declaratory judgment); Lampkin v. Connor, 360 F.2d 505, 508-09 (D.C. Cir. 1966) (broad discretion to decline to issue declaratory judgments).

[11] Ashwander v. TVA, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

[12] Pub. Affairs Assoc., Inc. v. Rickover, 369 U.S. at 113.

provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *Id.* at 591. Indeed, counsel for the *National Chamber* appellants concede that "[c]entral to the Supreme Court's exegesis of the ripeness doctrine is the insistance [sic] on a sufficiently defined record to insure informed and appropriately narrow adjudication." Brief for *National Chamber* Appellants at 47.

B. *Principles of Facial Adjudication*

Since the constitutional challenges pressed upon us here involve assertions of first amendment freedoms in conflict with the FECA, we briefly review the special status of facial first amendment attacks on the constitutionality of statutes or regulations.

Within the first amendment arena the jurisprudential criteria for constitutional adjudication are sometimes relaxed when a facial attack is launched. In some cases reaching the merits of facial challenges, standing has been broadened. For example, in *Gooding* v. *Wilson*, 405 U.S. 518, 520 (1972), the chill found by the Court to have been suffered by reason of the challenged ordinance was not limited to the injury experienced by the complaining individual. Thus, it has been suggested, the assertion of vicarious rights, otherwise not countenanced, may be permitted when a facial first amendment challenge is made.[13] In addition, in such cases the ripeness doctrine has been more loosely applied. Reasonable predictability of enforcement or threats of enforcement, without more, have sometimes been enough to ripen a claim. In one such case, *National Student Association* v. *Hershey*, 412 F.2d 1103 (D.C. Cir. 1969), this court held that the

[13] *See* Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 438-40 (1974); *See also* NAACP v. Button, 371 U.S. 415, 432-33 (1963); United States v. Raines, 362 U.S. 17, 21-22 (1960).

chill upon first amendment freedoms induced by a selective service directive concerning participation in "illegal" antiwar protests was a sufficiently concrete harm to permit pre-enforcement examination of the merits of a constitutional challenge to the directive.[14]

On the other hand, decisions reaching the merits of facial constitutional challenges—first amendment and otherwise—are the exception and not the rule. In his opinion for the Court in *Younger* v. *Harris*,[15] Mr. Justice Black noted:

> Procedures for testing the constitutionality of a statute "on its face" in the manner apparently contemplated by *Dombrowski*,[16] and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan. . . . [T]he task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies before the statute is put into effect, is rarely if ever an appropriate task for the judiciary. The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes, . . . ordinarily results

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[14] *Cf.* Police Dep't v. Mosley, 408 U.S. 92 (1972) (specific interpretation of anti-picketing ordinance had been given by police department). *See also* Baggett v. Bullitt, 377 U.S. 360 (1964) (enforcement of oath requirement had been threatened).

[15] 401 U.S. 37 (1971) (refusal on equitable grounds to enjoin pending state "criminal syndicalism" prosecution challenged under first amendment).

[16] Dombrowski v. Pfister, 380 U.S. 479 (1965) (holding abstention inappropriate in challenge by civil rights group to criminal aspects of subversive control laws).

> in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. In light of this fundamental conception of the Framers as to the proper place of the federal courts in the governmental processes of passing and enforcing laws, it can seldom be appropriate for these courts to exercise any such power of prior approval or veto over the legislative process.

401 U.S. at 52-53.[17]

With these not-easily-reconcilable principles in mind, we turn to the particular arguments made in, and the facts presented by, the appeals now before us.

II. THE *Martin Tractor* CASE, NO. 78-2080

A. *Factual and Procedural History*

In 1975, the Martin Tractor Company established the Kansas Economic Education Political Club ("Keep Club"), a PAC.[18] At that time the right of a corporation or union to establish, administer and solicit voluntary contributions to a PAC was generally acknowledged, and the only restrictions upon PAC operations were that corporate or union monies be kept separate from PAC monies and that all contributions to PACs be entirely voluntary. A corporation and its management were free

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[17] *See also* Bates v. State Bar, 433 U.S. 350, 381 (1977), *quoting* Broadrick v. Oklohoma, 413 U.S. 601, 613 (1973) (facial overbreadth review "strong medicine" to be "employed . . . sparingly and only as a last resort"); Nat'l Student Ass'n v. Hershey, 412 F.2d at 1113-15 ("we are not persuaded that every plaintiff who alleges a First Amendment chilling effect and shivers in court has thereby established a case or controversy").

[18] *Martin Tractor* App. 5-7.

to communicate with all employees and shareholders concerning its PAC and to solicit contributions to the PAC on a regular basis.[19]

The Martin Tractor Company administered the Keep Club in accordance with the above rights and restrictions until May 11, 1976, the effective date of the FECA Amendments of 1976.[20] Prior to that date, appellants Keep Club, Martin Tractor Company, Martin and Littlejohn (members of the Company's "executive or administrative personnel" group and persons responsible for supervising the Keep Club) communicated with all members of the company's corporate community, including appellant Bramlage (a Martin Tractor hourly employee), concerning the PAC and contributions to it. They did so orally and in writing, on and off the company premises, and more than twice a year.[21]

The 1976 Amendments impose restrictions upon the type, quantity and extent of "solicitation" permitted the appellants. Section 441b divides a corporation and those persons having a community of interest with it into two classes: (1) a corporation's stockholders and "executive or administrative personnel," defined as those employees who are "paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities;"[22] and (2) all other employees not defined as executive or administrative personnel.[23] A corporation and its PAC may communicate without restriction concerning contributions to the PAC only with the corporation's stockholders and

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[19] *See* Buckley v. Valeo, 424 U.S. at 28 n.31.

[20] Pub. L. No. 94-283, 90 Stat. 475, 502 (1976).

[21] *Martin Tractor* App. 7-9.

[22] 2 U.S.C. § 441b(b)(7) (1976).

[23] 2 U.S.C. § 441b(b)(4)(B) (1976).

executive or administrative personnel.[24] Solicitation of a corporation's hourly employees, however, is limited to twice in one year, and must be in writing and addressed to those employees at their residences.[25] The terms "solicit" and "solicitation" are not defined by the FECA.

As a result of the FECA Amendments of 1976, and the sanctions imposed for violations of their provisions,[26]

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[24] 2 U.S.C. § 441b(b)(4)(A)(i) (1976).

[25] 2 U.S.C. § 441b(4)(B) (1976). The Federal Election Commission ("FEC" or "Commission") has adopted regulations which implement the statutory provisions complained of by these appellants. 11 C.F.R. Part 114 (1979). The regulations divide the corporate community into two classes and restrict communication between them in exactly the same manner as § 441b. 11 C.F.R. §§ 114.6, 114.7 (1979).

[26] The FECA imposes substantial civil and criminal penalties for violations of its provisions and contains elaborate enforcement mechanisms leading to their imposition. The FEC is first required to endeavor to correct or prevent violations through informal methods leading to a conciliation agreement. 2 U.S.C. § 437g(a)(5)(A) (1976). As part of a conciliation agreement, the FEC may require payment of penalties equivalent to those available in a civil suit for enforcement. *Id.* §§ 437g(a)(6)(A)-(B). If conciliation fails, the FEC may bring a civil action with penalties of $5,000 or an amount equal to the expenditure or contribution involved in the violation. *Id.* § 437g(a)(5)(B). In the event of a knowing and willful violation, the penalties may be doubled. *Id.* §§ 437g(a)(6)(A), (a)(7). Without regard to any pending conciliation proceedings, the FEC may refer knowing and willful violations to the Attorney General of the United States for criminal prosecution. *Id.* § 437g(a)(5)(D). Criminal penalties for violations of the FECA include imprisonment and fines of $25,000 or treble the amount involved. *Id.* § 441j(a). The civil enforcement provisions were amended in 1980, but the nature and severity of the penalties that may be imposed were not changed. FECA Amendments of 1979, Pub. L. No. 96-187, § 108, 93 Stat. 1339, 1358-62 (1980).

these appellants conformed their political communications to the § 441b prohibitions. The Martin Tractor Company, its PAC, and its executive and administrative personnel no longer communicate freely with hourly employees about the PAC, and solicitations are made only twice a year, in writing at the residences of hourly employees.[27] According to the appellants' complaint, but for the § 441b restrictions and the threat of sanctions, they would resume the extent and manner of communication they engaged in previously.

Other appellants in the *Martin Tractor* case include Alton Box Board Company and its PAC, and Texas Steel Company, its PAC, and its president. The PACs of both these companies were not established until 1976[28] and neither had solicited hourly employees prior to the 1976 amendments. Their alleged injury is that they *would* commence communications with hourly employees more than the prescribed twice a year, and at places other than employees' residences, were it not for the FECA and its sanctions.[29]

Appellants in the *Martin Tractor* case allege that their behavior has thus far conformed to the statutory mandate. They make no allegation of an intention—imminent or otherwise—to violate the statute, and the Federal Election Commission ("FEC" or "Commission"), charged by the statute with enforcement of its terms,[30] has no cause to commence enforcement, nor even to threaten enforcement, of the challenged statutory pro-

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[27] *Martin Tractor* App. 7-9.

[28] *Martin Tractor* App. 10, 12.

[29] *Martin Tractor* App. 10-14.

[30] 2 U.S.C. § 437c(b) (1976).

visions against them.[31] Insofar as appears from their complaint, appellants did not communicate in any way with the FEC before this action was commenced.

Like the court below, we find that the case in its present posture is not ripe for decision. We ground our holding in the constitutional as well as the prudential aspects of the ripeness doctrine. We differ with the district court only slightly in our separate analysis of the doctrine as applied to first amendment challenges to statutes "on their face."

B. *The Statute on Its Face*

Neither the Act[32] nor the FEC's implementing regulations[33] define the prohibited solicitations. "Solicit" can,

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[31] The most appellants in *Martin Tractor* are able to argue is that

> [t]he FEC has never indicated to Appellants that it would permit an intentional violation of the statute to create a test case or agree not to initiate any civil or criminal proceedings in connection therewith.

Brief for *Martin Tractor* Appellants at 25 n.11. Because all appellants are conforming to and not violating the challenged section, there would be no reason for the Commission to initiate an investigation, 2 U.S.C. § 437g(a)(2) (1976), or to enter into a "conciliation agreement" with appellants, *Id.* § 437g(a)(5)(A), or to institute a civil action in federal district court to enforce the section against them. *Id.* § 437g(a)(5)(B).

[32] *See, e.g.*, 122 CONG. REC. 12477 (1976) (remarks of Sen. Domenici) (commenting on the FECA Amendments of 1976): "The conference report fails to adequately define 'solicit' or 'solicitation' thereby raising additional questions of what is possible and what is not." *But see* 122 CONG. REC. 12200 (1976) (remarks of Rep. Hays): "any action [that] could fairly be considered a request for a contribution should be treated as a solicitation."

[33] 11 C.F.R. §§ 114.5, 114.6 (1979) (solicitation by corporations); 11 C.F.R. § 114.7 (1979) (solicitation by membership organizations or cooperatives); 11 C.F.R. § 114.8 (1979) (solicitation by trade associations).

of course, mean a variety of things.[34]

Although the context differs, the Supreme Court has recently addressed the meaning of "solicitation" and the constitutional implications of proscribing behavior so described.[35] In doing so, it has upheld against constitutional attack application of a state-imposed ban on solicitation by lawyers, *Ohralick* v. *Ohio State Bar Association*, 436 U.S. 447 (1978), but has also invalidated under the first amendment a ban on such solicitation as applied in a non-remunerative context, *In re Primus*, 436 U.S. 412 (1978). Since the Court had earlier announced that it would not entertain facial attacks upon limitations to "commercial speech," *Bates* v. *State Bar*, 433 U.S. 350, 379-81 (1977), these "solicitation" cases were decided in a fairly complete factual context and upon a well-developed record. Despite the differences between "commercial" and "non-commercial" speech, we think it is not insignificant that details about the kind, manner and purpose of the "solicitation" were crucial to the Court's decisions in *Ohralick* and *Primus*—the very kind of details which are absent here.

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[34] Addressing the Securities Exchange Act's prohibition of the solicitation of certain proxies, one circuit court has concluded that solicitation "is a question of fact dependent upon the nature of the communication and the circumstances under which it is transmitted." Sargent v. Genesco, Inc., 492 F.2d 750, 767 (5th Cir. 1974).

[35] On earlier occasions the Court has reviewed determinations made by the NLRB concerning the lawfulness under the National Labor Relations Act of employer-imposed bans on membership "solicitation" by unions. NLRB v. Baptist Hosp., 442 U.S. 773 (1979); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). Although these cases did not discuss first amendment rights (*but see* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)), it is apparent that the lawfulness of the Board's determinations in those cases depended in large measure on the care with which the respective rights of employees and management had been balanced with reference to the time, place and manner of "solicitation" prohibited.

The inherent vagueness of the term "solicit," coupled with the Commission's failure to define the term by regulation, might at first glance be thought to militate in favor of reaching the merits of appellants' claims. The decided cases demonstrate that the extent of the chill upon first amendment rights induced by vague or overbroad statutes is the most significant factor in determining whether an otherwise premature or abstract facial attack such as we have here is ripe for decision.[36]

Hence, we examine the nature and extent of the potential chill to determine whether there is in fact a ripe case or controversy in the absence of any enforcement threat or even certainty that the appellants and the FEC will ever be at odds about the interpretation of the Act's prohibition of "solicitation" activities. We find the extent of the chill induced by the statutory provision at issue here a very limited one.

First, to the extent that it offers a prompt means of resolving doubts with respect to the statute's reach, the advisory opinion (AO) mechanism written into the

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[36] Bates v. State Bar, 433 U.S. at 380-81; Laird v. Tatum, 408 U.S. at 11 (*citing* cases); Walker v. City of Birmingham, 388 U.S. 307, 344-45 (1967) (Brennan, J., dissenting) "[Supreme] Court has modified traditional rules of standing and prematurity" in order to "insulate all individuals from the 'chilling effect' upon exercise of First Amendment freedoms generated by . . . overbreadth"); Davis v. Ichord, 442 F.2d 1207, 1214-15 (D.C. Cir. 1970); Nat'l Student Ass'n v. Hershey, 412 F.2d at 1115 ("[i]n determining whether a given chilling effect is sufficient, it would seem relevant to consider, *inter alia*: . . . the severity and scope of the alleged chilling effect on first amendment freedoms . . ."); Reed Enterprises v. Corcoran, 354 F.2d 519, 523 (D.C. Cir. 1965). *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853 (1970); Note, *Overbreadth Review and the Burger Court*, 49 N.Y.U. L. REV. 532 (1974).

FECA,[37] under which the Commission is authorized to give advice concerning the Act's application to specific factual situations,[38] mitigates whatever chill may be

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[37] As amended in 1976, the FECA provided:

> The Commission shall render an advisory opinion, in writing, within a reasonable time in response to a written request by any individual holding Federal office, any candidate for Federal office, any political committee, or the national committee of any political party concerning the application of a general rule of law stated in the Act or chapter 95 or chapter 96 of title 26, or a general rule of law prescribed as a rule or regulation by the Commission, to a specific factual situation.

2 U.S.C. § 437f (1976). This section was amended by the FECA Amendments of 1979, Pub. L. No. 96-187, § 107, 93 Stat. 1357-58 (1980). The Act now provides:

> Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

Id.

[38] Ironically, the restrictions on solicitations from hourly employees challenged here were added in reaction to a broad "advisory opinion" under which such solicitations were generally permitted. *See* 122 CONG. REC. 8863-66 (remarks of Reps. Frenzel, Hays, Wiggins), 8881 (remarks of Rep. Thompson) (1976).

Dissatisfied with the FEC's position, the House passed a bill which would have required all advisory opinions stating rules of general applicability to be submitted to Congress for review. That requirement was deleted in Conference, *see* H.R. CONF. REP. No. 94-1057, 94th Cong., 2d Sess. 43-45 (1976), but the Conference substituted a requirement that advisory opinions be issued only with respect to "specific fact situations," and prohibited the Commission from issuing any advisory opinions except those which "relate to the applica-

induced by the statute and argues against constitutional adjudication on a barren record.[39]

At the time this case was argued, only specified individuals and groups—but including "political [action] committees" [40]—were eligible to seek advisory opinions.

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tion of a general rule of law which is stated in the Act . . . or which already has been prescribed by a rule or regulation." *Id.* at 44.

As can be seen from comparing the advisory opinion provisions before and after the 1980 amendments, the language which tied the issuance of advisory opinions to "specific factual situations" has been revised. Advisory opinions are now tied to "a specific transaction or activtiy by the person [requesting advice]." Pub. L. No. 96-187, § 107, 93 Stat. 1358 (1980).

[39] *Cf.* W.E.B. DuBois Clubs v. Clark, 389 U.S. 309, 312 (1967) (per curiam) (declining to reach merits of first amendment claim in view of administrative mechanism required by statute to be followed before compliance with challenged registration provisions might have been compelled). *See* Eccles v. Peoples Bank, 333 U.S. 426, 434 (1948) (equitable relief inappropriate where administrative intent has not come to fruition or is unknown); Nat'l Conservative Political Action Comm. v. FEC, No. 78-1543, slip op. at 7-8 (D.C. Cir. Mar. 11, 1980) (case ripe where pertinent regulations and AO have been issued).

Appellants cite that portion of the legislative history of the Act which suggests that the expedited review procedures of § 437h, invoked here, were designed to allow plaintiffs to raise constitutional issues "in court without exhausting administrative remedies to the extent the courts have jurisdiction under established principles." 120 CONG. REC. 35134 (1974) (Rep. Hays). *See also* 120 CONG. REC. 35140 (1974) (Rep. Frenzel). But even if § 437h applied, "established principles" which confine adjudication to concrete and developed fact situations would require the same conclusion.

[40] As amended in 1974, the FECA defined a "political committee" as follows:

> any committee, club, association, or other group of persons which receives contributions or makes expenditures

The FECA Amendments of 1979 have broadened the class of those eligible to seek such opinions to include any "person." [41] AOs are binding in the sense that reliance on an AO was and is a defense to criminal prosecution or civil suit.[42] In addition, AOs must be issued promptly.

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during a calendar year in an aggregate amount exceeding $1,000.

2 U.S.C. § 431(d) (1976). Advisory opinions, first authorized in 1974, have routinely been requested by and issued to corporate and trade association political action committees or separate segregated funds. *E.g.*, AO 1979-38 (Jul. 31, 1979), *reprinted in* FEDERAL ELECTION CAMPAIGN FINANCING GUIDE (CCH) ¶ 5422 (solicitation of administrative personnel of franchisees) (corporate political action committee); AO 1978-83 (Dec. 18, 1978), *reprinted in* FEDERAL ELECTION CAMPAIGN FINANCING GUIDE (CCH) ¶ 5382 (convention booth for seeking solicitation approvals) (trade association political action committee). The Act's definition of "political committee" has been clarified and revised; it now expressly includes "separate segregated fund[s]." (In addition, separate segregated funds now constitute "political committees" irrespective of the amount of contributions received or expenditures made.) *See* H.R. REP. No. 96-422, 96th Cong., 1st Sess. 5 (1979). FECA Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339 (1980). *But see* 125 CONG. REC. S19099 (daily ed. Dec. 18, 1979) (remarks of Sen. Bumpers) (amendment to be read in light of purpose to regulate federal elections; funds established to engage in state and local election activities not required to register or report); 125 CONG. REC. H12365 (daily ed. Dec. 20, 1979) (remarks of Reps. Frenzel and Thompson) (same).

[41] Pub. L. No. 96-187, § 107, 93 Stat. 1358 (1980).

[42] As amended in 1976, the Act provided as follows:

(1) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (2) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any

The Act now requires that the Commission act within sixty days of the request for advice.[43]

When a means like this one is available to reduce uncertainty or narrow the statute's reach and that means can be pursued at little risk to the rights asserted, the chill induced by facial vagueness or overbreadth is *pro tanto* reduced.[44]

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sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(2) Any advisory opinion rendered by the Commission . . . may be relied upon by (A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and (B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

2 U.S.C. § 437f(b) (1976). The Act now provides:

(c)(1) Any advisory opinion rendered by the Commission . . . may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

FECA Amendments of 1979, Pub. L. No. 96-187, § 107, 93 Stat. 1358 (1980).

[43] *See* note 37, *supra*. The FECA formerly required only that AOs be issued "within a reasonable time." 2 U.S.C. § 437f (1976).

[44] In Buckley v. Valeo, 424 U.S. 1 (1976), the advisory opinion mechanism was argued as a means of saving the Act's expenditure limitations from unconstitutional vagueness, but the Supreme Court rejected the argument, noting that advisory opinions were available only to a few specified individ-

A second reason for skepticism about the extent of the chill suffered in these cases is the uncertain scope or nature of the legal rights alleged to have been invaded. The statutory provision at issue in the *Martin Tractor* case restricts "solicitation" of contributions by corporations and corporate PACs of the corporation's own employees. The Supreme Court has recently warned that corporations and their representatives may not be denied at least some of the first amendment rights accorded individuals or other sorts of organizations, *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), but earlier cases have suggested that the first amendment rights of corporations with respect to communications with their own employees may not be as strong or as extensive as their first amendment rights to communications with the public at large. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The chill suffered cannot be deeper or broader than the rights enjoyed and precedent here suggests a thin layer of potential chill.

At any rate, few decisions reaching the merits of facial first amendment attacks have involved the first amendment rights of for-profit corporations [45] and furthermore, most cases reaching the merits of facial first amendment challenges have shown indicia of ripeness absent here.

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uals and groups and that they were not required to be issued except within a reasonable time. *Id.* at 40 n.47. Both these aspects of the AO mechanism have been amended and the susceptibility of the FECA to challenge on the grounds of vagueness has consequently been reduced.

[45] *See, e.g., Bellotti, supra*, 435 U.S. 765; Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (township's prohibition of "for sale" signs to prevent "white flight"); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (town's prohibition of topless entertainment).

The most recent such case considered by the Supreme Court, *Village of Schaumberg* v. *Citizens for a Better Environment*, 100 S.Ct. 826 (1980), is an apt illustration. At issue there was the Village's prohibition of certain "solicitation" activities by charitable organizations who are not able to show that at least 75 percent of the solicitation proceeds are used for "charitable purposes." In finding the ordinance facially invalid, the Court expressly disclaimed reliance on uncontroverted "facts" presented by the charitable organization showing that less than 75 percent of their solicitation proceeds were used for "charitable purposes." Thus, the factual context was incomplete. It was not, however, completely lacking. The types of activity in which the organization had engaged and planned to engage were alleged with some particularity, *id.* at 830, and the Village's intention to enforce the ordinance against the complaining organization was clear. *Id.*[46]

Similarly, in *Bellotti*, *supra*, 435 U.S. 765, the Massachusetts attorney general had specifically threatened enforcement of the challenged statutory provision against the three corporations who sought declaratory relief. *Id.* at 769. In addition, the case was submitted upon "66 paragraphs of stipulated facts and 70 pages of supporting documents relevant to those stipulations," 359 N.E. 2d 1262, 1268 (Mass. 1977), a record which the Massachusetts Supreme Judicial Court characterized as "sufficient to support this adjudication." *Id.* at 1268.[47]

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[46] The Village had denied the organization a required permit.

[47] *See* 435 U.S. at 769.

Finally, the decision to reach the merits was initially made by a state and not a federal court, a circumstance under which some aspects of the ripeness doctrine may not play as large a role in the Court's own decision. *See* Adler v. Bd. Educ., 342 U.S. 485 (1952) (majority reached merits of case decided on merits by state court; Frankfurter, J., dissented on ripeness grounds).

Other cases teach a similar lesson.[48] In all these cases, either the activities in which the complainants wished to (or had) engaged or the enforcing authority's particular intent to enforce the statute, or both, were clear enough to show the adversarial posture assumed by the parties and the contours of their dispute. Not so here.

The lack of specificity of plaintiffs' alleged intentions has already been described. The Commission, for its part, has said or done nothing to our knowledge to indicate how it construes the term "solicit." The Commission's regulations simply parrot the statutory language

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[48] Broadrick v. Oklahoma, 413 U.S. at 609 (complainants were charged by state authority with violation of statute); Gooding v. Wilson, 405 U.S. at 520 (complainant was criminally convicted for speech prohibited by statute); Keyishian v. Bd. of Regents, 385 U.S. 589, 592 (1967) (complainants' employment had been terminated or threatened because they refused to make required "loyalty" statements); Shelton v. Tucker, 364 U.S. 479, 484 (1960) (teachers' contracts were not renewed when they refused to file state-required affidavits); Herndon v. Lowry, 301 U.S. 242, 243 (1937) (complainant was criminally convicted for activities prohibited by statute). *Cf.* Police Dep't v. Mosley, 408 U.S. at 93 (equal protection analysis) (complainant who had repeatedly picketed in certain manner ceased picketing after seeking and receiving interpretation of new ordinance); Coates v. City of Cincinnati, 402 U.S. 611, 612 (1971) (due process analysis) (complainants had been criminally convicted for conduct prohibited by the challenged ordinance); Baggett v. Bullitt, 377 U.S. at 363-64 (state authority had issued memorandum of intention to enforce oath requirement against university teachers). *See* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 848 (1970) (arguing ripeness of overbreadth challenges may inhere in actual enforcement of statute against challenger). *Compare* Zwickler v. Koota, 389 U.S. 241 (1967) (holding abstention improper in light of possible chill to plaintiff's first amendment rights) with Golden v. Zwickler, 394 U.S. 103 (1969) (same case, holding declaratory relief inappropriate where change in events altered imminence of plaintiff's prohibited behavior).

in this respect and although numerous advisory opinions have been issued, none cited by the parties shed much light on the Commission's interpretation of "solicitation" activities. Appellants may thus be left without substantial guidance to regulate their conduct, but we are also left without substantial guidance to decide this case or even to frame the constitutional issues at stake.

The statute specifically allows some solicitation, limited in the case of hourly employees to written communications, twice a year, addressed to the employee's home. Given the ambiguity of the word "solicit," we are essentially being asked to decide that Congress may not delegate to the FEC—as it has to the NLRB [49]—the task of deciding in the first instance what should be permitted and what forbidden in the inherently coercive context of employer-employee relationships. We are hesitant so to rule.

Finally, appellants contend that their claims are no less ripe than those of the plaintiffs in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), who obtained a decision on the merits without first violating the statute or pursuing administrative relief or clarification through an advisory opinion. Addressing this court's determination that the issue relating to the Commission's method of appointment was not ripe for decision, the Supreme Court there acknowledged that "'[p]roblems of prematurity and abstraction' . . . may prevent adjudication in all but the exceptional case," 424 U.S. at 114, *quoting Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972), but went on to declare, quoting from *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974), that "ripeness is peculiarly a question of timing." Noting that since the time of the Court of Appeals judgment the Commission

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[49] NLRB v. Gissel Packing Co., 395 U.S. 575, 620 (1969), *citing* NLRB v. Virginia Power Co., 314 U.S. 469, 479 (1941).

had begun to issue regulations and as to the Commission's powers not yet exercised, that "the date of their all but certain exercise is now closer by several months than it was at the time the Court of Appeals ruled," *id.* at 116-17, the Court held the issue to be ripe for decision.

The "question of timing" before the Supreme Court in the *Buckley* case can hardly be likened to the one before us now. The Court there was faced with a broad range of fundamental challenges to the nation's election laws at a time when any further delay in adjudication—to the period during or after the 1976 Presidential campaign—would have been enormously troublesome. We see no similar urgency of decision in this case that outweighs the inadvisability of premature constitutional adjudication and note again the comparative speed with which an advisory opinion on specific conduct can be secured.[50]

C. *The Statute "As Applied"*

Insofar as appellants can be understood to attack the constitutionality of § 441b "as applied," our decision with respect to the facial claims presented is *a fortiori*.

The chill-reducing advisory opinion mechanism is also a relatively riskless controversy-ripening tool, requiring

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[50] Appellants argue the facial unconstitutionality of § 441b under the fifth amendment as well as under the first. As we perceive them, these arguments are not separable. A determination of the arbitrariness under the fifth amendment of the lines drawn by Congress will turn on the incidental effect of those particular lines on first amendment rights. *See* Police Dep't v. Mosley, 408 U.S. at 101 (equal protection analysis of ordinance drawing distinction between labor and nonlabor picketing). In the final analysis, the first and fifth amendment arguments will rise or fall together and consequently should be considered together, if possible. We thus decline now to reach the merits of appellants' fifth amendment claims.

the Commission to state its position with respect to the specific facts for which advice is sought. It is true that appellants seeking an advisory opinion will be required to propose to the Commission "a specific transaction or activity," 93 Stat. 1358, something which they were apparently unwilling to do in this court; but the issues should be crystallized in some fashion before we rule and the AO mechanism affords a relatively riskless way of doing this.[51] We note that many "political committees" similar to the PACs here have followed the advisory opinion route to obtain clarification of the Act as it relates to specific intended conduct, and although the Commission has not much illuminated the meaning of "solicit,"[52] it has issued numerous AOs defining the reach

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[51] As noted earlier, text at note 41, all the appellants here are now eligible to seek advisory opinions. Even if the *status quo ante* had prevailed, our decision would not have been different, because those appellants (the PACs) who were eligible to seek AOs share a commonality of interest with those that are not and there is no reason to suppose that the eligible appellants here would have been less motivated to seek advice than those not eligible to do so.

[52] *But see* AO 1979-50 (Oct. 19, 1979) *reprinted in* FEDERAL ELECTION CAMPAIGN FINANCING GUIDE (CCH) ¶ 5434 (solicitation of union employees) (request for contributions may not be printed in union newspaper, even with caveat that contributions from union non-members will be returned, when 15 percent of newspaper circulation is to union non-members); AO 1978-83 (Dec. 18, 1978), *reprinted in* FEDERAL ELECTION CAMPAIGN FINANCING GUIDE (CCH) ¶ 5382 (convention booth for seeking solicitation approvals) (suggesting that use of conspicuous identifying sign or sale of promotional material may constitute unlawful "solicitation") (Aikens, Chm., dissenting, *inter alia*, on grounds of Commission's failure to address meaning of "solicit").

of § 441b with respect to specific factual patterns.[53]

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[53] *See, e.g.*,

AO 1979-38 (Jul. 31, 1979) (solicitation of administrative personnel of franchisees);

AO 1979-31 (Sept. 15, 1979) (contributions given to unaffiliated PAC);

AO 1979-27 (Jun. 19, 1979) (payment of PAC administrative expenses);

AO 1978-97 (Jan. 16, 1979) (solicitation in union magazine);

AO 1978-83 (Dec. 18, 1978) (trade association's convention booth may seek approval for corporate solicitations);

AO 1978-39 (Nov. 20, 1978) (corporate PAC and trade association PAC affiliated)

AO 1978-75 (Oct. 30, 1978) (corporate PAC may solicit stockholders of parent corporations);

AO 1978-61 (Oct. 10, 1978) (franchisor PAC may solicit executives of franchisees)

AO 1978-52 (Sept. 5, 1978) (corporation may distribute information about Congressmen to its stockholders);

AO 1977-67 (Jun. 28, 1978) (non-stock corporate PAC may solicit dues-paying "members" who indicate a desire to be members);

AO 1978-26 (Jun. 15, 1978) (beneficial owners of stock may be solicited);

AO 1978-27 (Jun. 9, 1978) (managers of a corporation's cafeterias and motels are executives for solicitation purposes);

AO 1976-79 (Apr. 14, 1978) (solicitations by organizations without members);

AO 1977-70 (Mar. 29, 1978) (PAC of a licensing corporation may solicit the executives of franchisees);

[Continued]

It does not take great deal of imagination to conjure up a variety of quite different sorts of communications between the corporate plaintiffs, their PACs, their man-

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[53] [Continued]

AO 1977-71 (Mar. 17, 1978) (trade association may solicit executives of a management corporation);

AO 1977-44 (Jun. 11, 1978) (trade association may solicit members of affiliated trade associations);

AO 1977-32 (Dec. 20, 1977) (trade association may not solicit executives of member municipal corporations without permission of corporations);

AO 1977-56 (Dec. 19, 1977) (proper method of handling employee contributions to PAC);

AO 1977-18 (Nov. 18, 1977) (limitation on trade association PAC's solicitation of board members who are also officers of member corporations);

AO 1977-17 (May 27, 1977) (commodity exchange PAC may not solicit representatives who are not full members);

AO 1976-96 (Nov. 11, 1976) (trade association PACs may not solicit executives of non-consenting corporations);

AO 1976-18 (Sept. 20, 1976) (soliciting contributions by selling tee-shirts is prohibited);

AO 1976-27 (Sept. 2, 1976) (solicitation of trade association members approved under certain circumstances).

The Commission's Advisory Opinions are reported in FEDERAL ELECTION CAMPAIGN FINANCING GUIDE (CCH).

See also our recent ruling in Nat'l Conservative Political Action Comm. v. FEC, No. 78-1543 (D.C. Cir. Mar. 11, 1980), involving the validity of an advisory opinion concerning the lawfulness of a contribution solicitation proposed by the Democratic National Committee. In that case we held that

agement representatives and their employees which could be characterized as "solicitations" for some purposes, pretermitting the questions whether they would be prohibited for purposes of the FECA or protected by the first amendment. A few examples will suffice: (1) a printed notice of the existence of the PAC with an address where to send money, (a) posted on the employees' bulletin boards, or (b) enclosed with their paychecks; (2) a similar notice similarly disseminated but containing an explicit exhortation or job-related inducement for contributions; (3) a meeting of employees called by corporate or PAC officials solely (a) to tell employees about the PAC and its purposes or (b) to ask employees to contribute anonymously, or identifiably; (4) announcement and implementation of a system of paycheck deductions on request; (5) advertisements in company newspapers; (6) on-the-job requests for contributions; or (7) personal home visits to request contributions. We are left to speculate both on the conduct of the appellants and on the enforcement posture the Commission would assume with respect to that conduct. The careful examination required for first amendment analysis "as applied" [54] deserves more of a record than that presented here.

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the procedural issue there raised was ripe for adjudication when "the Commission passed upon the legality of a concrete solicitation proposed in some detail by DNC."

[54] Kovacs v. Cooper, 336 U.S. 77 (1949) (ordinance forbidding "sound trucks" on public streets upheld as applied). *Cf.* Sherbert v. Verner, 374 U.S. 398 (1963) (eligibility requirement for unemployment compensation as applied to Seventh Day Adventist violates free exercise clause). *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03 (1973); Int'l Soc'y for Krishna Consciousness v. Bowen, 600 F.2d 667 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 448 (1979).

Because the advisory opinion mechanism is available, we do not here decide whether in some other case these appellants or other individuals, groups or corporations must choose between total inaction and action that may invoke FEC disfavor.[55] Nor are we suggesting that resort to the advisory opinion mechanism of the FEC is required in all cases of constitutional challenge before they become ripe for adjudication.

III. THE *National Chamber* CASE, NO. 79-1027

The *National Chamber* case raises the question of the constitutionality of the FECA's restrictions on solicitation by separate segregated funds, 2 U.S.C. §§ 441b(b)(4)(A)(i), 441b(b)(4)(C), 441b(b)(4)(D) (1976).[56] The statutory language challenged in *National Chambers* is in some ways broader and less clearly focused than that challenged in *Martin Tractor*.

The emphasis in *National Chamber* is on the FECA's blanket prohibition of solicitations rather than on the specific language of the Act's narrow statutory exceptions.[57] Since the provisions challenged in *National*

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[55] *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 88-90 (1947); Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1150 n. 17 (D.C. Cir. 1977) (questioning the continuing validity of *Mitchell* to challenges under the Hatch Act).

[56] *See* note 1, *supra*, for the text of these provisions.

[57] The design of the statute is one which states a general prohibition and follows this by narrowly drawn exceptions. Thus the Act prohibits *all* solicitations except those expressly permitted. Appellants in *Martin Tractor* devote their energies to the narrowness of the particular exception created for non-management employees and to the greater breadth of the management employees exception. Appellants in *National Chamber* concentrate their attention on the implications of the general prohibition rather than on the narrowness of the particular exceptions, although they also object to the special emphasis given by the regulations, *infra*, note 59, to solicitations of parties with a specified relationship to the solicitor.

Chamber restrict more than an employer's activities with respect to its own employees, the cases suggesting narrow first amendment rights with respect to communications to employees and a correspondingly lean layer of potential chill do not contribute much insight into analysis of the claims made here.

On the other hand, the *National Chamber* case presents an even more elusive factual context than that presented in *Martin Tractor*. Appellants here—the Chamber of Commerce of the United States, its PAC and officials—allege nothing more than a "desire to communicate with political action committees" or, in the case of individual appellant Roland that he "would undertake . . . communications to political action committees."[58] Nowhere do these appellants define with any

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[58] *National Chamber* App. at 11. Paragraphs 14 and 15 of their complaint explain the types of "communications" in which they wish to engage and the basis for their grievance:

> 14. The "solicitation" activities of the Plaintiffs are non-partisan in nature and consist not merely of a request for contributions, but more importantly consist of and are directed to the dissemination of ideas, opinions, and political information about matters of vital national concern. Through these "solicitation" activities, by both the written and spoken word, the Plaintiffs discuss those political, social and economic forces, events and decisions which have significant implications for the private enterprise system and those who share or believe in the benefits of this economic philosophy. Through their "solicitation" activities, the Plaintiffs discuss the programs of the Alliance as a means of affecting and helping to shape the process of decision-making on such matters. In short, through their "solicitation" activities, Plaintiffs state the rationale for making voluntary contributions to the Alliance as a means of voluntarily associating with persons of similar social and political beliefs and of furthering the common goals and objectives shared by the Plaintiffs and those who read or hear the Plaintiffs' views. The activities of the Plaintiffs described above are protected

precision the form, content, method, place or frequency of that communication except in the broadest of terms—terms that merely parallel the general language of the FECA and the Commission's regulations.

In this case, as in the *Martin Tractor* case, appellants do not so much as threaten a statutory violation; they have not communicated with the FEC concerning the activity they would like to undertake, and the FEC has taken no action to enforce the statute or its regulations [59]

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by the First Amendment guarantees of freedom of speech and freedom of association.

15. The voluntary contributions to the Alliance made by those to whom the Plaintiffs' "solicitation" activities are directed manifest their agreement with and support for the philosophy espoused by the Plaintiffs and make possible the conduct of the programs of the Alliance through which this philosophy may be communicated to the electorate. The ability of the Plaintiffs to communicate their words, thoughts and ideas to a broadly based audience for the purpose of "soliciting" their financial assistance as an expression of their support for the Plaintiffs' announced political philosophy and goals is significantly circumscribed by certain provisions of the Act, which limit the Plaintiffs' "solicitation" activites only to those few categories of solicitees enumerated in the Act. This unlawful restriction on Plaintiffs' "solicitation" activities likewise abridges the right and ability of those potential solicitees not enumerated in the Act to associate with the Plaintiffs by making voluntary contributions to the Alliance.

Id. at 5-6.

[59] One regulation adopted by the FEC is addressed more specifically than the underlying statute to the prohibition of solicitation by trade association PACs of the PACs of their corporate members. 11 C.F.R. § 114.7(j) (1979). In urging the case is "ripe" for adjudication, appellants in *National Chamber* emphasize the adoption of this regulation. Brief for *National Chamber* Appellants at 44-49. But as we read the statute a crucial ambiguity inheres in the word "solicit," re-

against them, nor has it threatened to do so.[60]

The district court's dismissal of the *National Chamber* complaint followed by two weeks its dismissal of the complaints in *Martin Tractor*. Noting in its memorandum opinion that the two cases raised "nearly identical" issues,[61] the district court rested its dismissal in *National Chamber* on ripeness grounds and referred to its decision in *Martin Tractor* for a fuller explanation of reasons.

We follow suit. The joinder of issue (if such it can be termed) in the *National Chamber* case, like the joinder of issue in *Martin Tractor*, is not one ideally postured for constitutional adjudication and, for all the

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gardless of the identity of the parties of whom "solicitation" is forbidden. We thus do not agree with the *National Chamber* appellants that adoption of the regulation has ripened their dispute sufficiently to render it justiciable.

[60] Indeed, appellants' first amendment rights to "discuss those political, social and economic forces, events and decisions which have significant implications for the private enterprise system" with "those who share or believe in the benefits of this economic philosophy" are in fact not challenged by the FEC, which insisted in the district court:

> nothing in the Act prohibits any corporation or corporate PAC from discussing those political, social and economic forces, events and decisions which have significant implications for the private enterprise system . . . . Rather, the subsection challenged here states only that it shall be unlawful for a corporation or corporate PAC to use corporate funds to "solicit contributions" from other than those enumerated for use in federal campaigns. Plaintiffs are free from statutory restraints contained in section 441b(b)(4)(A)(i) in the discussion of general political issues and should not be heard to argue that the provision so restricts them.

Points and Authorities in Support of Defendants' Motion to Dismiss, *National Chamber* App. at 35.

[61] *National Chamber* App. at 97.

reasons discussed above with respect to the *Martin Tractor* case, we decline to reach the merits here.

IV. Conclusion

We therefore affirm the district court's dismissal of the complaints filed in these cases.[62] Since the substantive questions of the FECA's constitutionality were not and should not have been reached, the FECA's *en banc* cer-

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[62] We note that Judge Parker of our own district court has quite recently upheld the constitutionality of § 441b—as applied to a corporation without capital stock (the "NRWC") which had solicited contributions from persons other than its "members." FEC v. Nat'l Right to Work Comm., Civ. Nos. 77-2175, 78-0315 (D.D.C. Apr. 24, 1980). In that case an advisory opinion had been requested, the request renewed, and a draft opinion submitted by the staff to the Commission before an investigation of the NRWC was begun. When subsequent conciliation efforts concerning the NRWC's actual conduct proved unsuccessful, the NRWC brought an action for declaratory and injunctive relief and the Commission a civil enforcement action. The cases were submitted to the court on cross-motions for summary judgment after the parties had "conducted extensive discovery and agreed upon a comprehensive stipulation of facts supported by three volumes of exhibits." Slip op. at 8. Without suggesting any view of the merits of that opinion, we note the highly developed record on which the constitutionality of § 441b was there determined.

The district court in *NRWC* expressly addressed the ambiguity of the Act and acknowledged that the "outward boundaries of the word [solicitation] may be uncertain," but found, nevertheless, that the specific activities in which the NRWC had engaged "lay at the heart" of the § 441b ban. *Id.* at 12. We, on the other hand, have no way of determining whether appellants' activities do or do not lie "at the heart" of the statutory prohibition. The district court found the term "solicit" certain enough as applied to the NRWC to preclude vagueness and overbreadth challenges. In the facial challenges we address, we find the term "solicit" uncertain enough to require a better-developed record where that can be obtained without leaving the rights at stake in jeopardy.

tification provision, § 437h, need not have been applied [63] and the question whether these appellants may proceed under that section [64] need not now be answered.

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[63] *See* Clark v. Valeo, 559 F.2d at 645 n.2:

> A District Judge requested to make certification under § 437h should be free to dismiss for want of jurisdiction, or to permit that question be decided by this court *en banc*, much as a single judge asked to seek convening of a three-judge court under 28 U.S.C. § 2284 may determine threshold jurisdictional questions himself or herself, or call for such a court and allow that court to decide the matter.

The Act provides that the district court shall certify to the *en banc* circuit court "all questions of constitutionality of *this Act*." 2 U.S.C. § 437h (1976) (emphasis supplied).

[64] *See* notes 5 and 6, *supra*.

APPENDIX B

No. 79-1027

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

NATIONAL CHAMBER ALLIANCE FOR POLITICS, ET AL.,
Appellants

v.

FEDERAL ELECTION COMMISSION, ET AL.
AND CONSOLIDATED CASE NO. 78-2080

Filed June 10, 1980

BEFORE: McGowan and Wald, Circuit Judges

ORDER

Upon consideration of appellants' (National Chamber Alliance for Politics, *et al.*) petition for rehearing, it is

ORDERED, by the Court, that appellants' aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judge Leventhal was a member of the panel which decided this case but died and did not participate in the foregoing order.

APPENDIX C

No. 79-1027

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

NATIONAL CHAMBER ALLIANCE FOR POLITICS, ET AL.,
Appellants

v.

FEDERAL ELECTION COMMISSION, ET AL.
And Consolidated Case No. 78-2080

Filed June 10, 1980

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Mikva, and Edwards, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellants (National Chamber Alliance for Politics, *et al.*) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1333
NATIONAL CHAMBER ALLIANCE FOR POLITICS, ET AL.,

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, ET AL.,

Defendants.

Filed November 23, 1978

MEMORANDUM

This case presents issues nearly identical to those disposed of by this Court's earlier decision in *Martin Tractor Co.* v. *Federal Election Commission*, — F. Supp. — (C.A. No. 78-1259, November 8, 1978). Only the granting of an extension in the briefing schedule at the request of one of the parties prevented decision of these two cases in tandem.

Plaintifs here are the Chamber of Commerce, a not-for-profit corporation, its associated political action committee (PAC), the National Chamber Alliance for Politics, three executives of the two organizations, and one member of the Board of Directors of the Chamber and the Advisory Committee of the Alliance. Plaintiffs challenge the constitutionality of the limitations upon corporate solicitation of contributions to political action committees as well as limitations upon solicitations by corporations or PACs from other PACs, imposed by the Federal Election Campaign Act, 2 U.S.C. §431, *et. seq.* (1977). Plaintiffs allege that these limitations impinge upon rights to free speech and association guaranteed in the First Amendment and create an invidious discrimination against corporations and PACs in violation of the Fifth Amendment.

The same factors which required dismissal of the action in *Martin Tractor* prove fatal to plaintiff's case here. The special standing provision of 2 U.S.C. §437h(a) is inapplicable to the Chamber and its PAC as they are not among the entities enumerated in that provision. The Court's reasoning in *Martin Tractor* as to the standing of the corporate executives and hourly employees under §437h(a) applies equally to the individual plaintiffs here. They sue not in their individual capacities but rather to vindicate the rights of the corporate entities. That derivative right was not the constitutional right of an "individual eligible to vote" which Congress considered "appropriate" for vindication in a declaratory judgment action under this section. Moreover, plaintiffs present no case or controversy sufficiently ripe for decision by a federal court. As in *Martin Tractor*, here "[n]o threat of interference . . . appears beyond that implied by the existence of the law and the regulations." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 91 (1947). Accordingly, defendant's motion to dismiss must be granted.

/s/ LOUIS F. OBERDORFER
United States District Judge

Dated: November 22, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 78-1333

NATIONAL CHAMBER ALLIANCE FOR POLITICS, ET AT.,
Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, ET. AL.
Defendants.

Filed November 22, 1978

ORDER

Having considered the pleadings and briefs of the parties, it is this 22d day of November, hereby

ADJUDGED, DECREED AND ORDERED that Defendants' Motion to Dismiss is GRANTED.

/s/ LOUIS F. OBERDORFER
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1333

NATIONAL CHAMBER ALLIANCE
FOR POLITICS, ET AL.

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION, ET. AL.

Defendants.

Filed November 28, 1978

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Jurisdiction

1. This action seeks a judgment declaring that certain provisions of the Federal Election Campaign Act, as amended, (hereinafter "the Act"), 2 U.S.C. §431 *et seq.* (1977), both facially and as applied to the Plaintiffs, constitute an unconstitutional abridgment of the Plaintiffs' rights to freedom of speech and association and their rights to due process of law in violation of the First and Fifth Amendments to the Constitution of the United States.

2. This action also seeks a permanent injunction, restraining enforcement of the offending provisions of the Act.

3. The Plaintiffs in this case have and will continue to be irreparably and immediately harmed by the offending provisions of the Act, and a case or controversy exists between the parties within the meaning of Article III of the Constitution of the United States.

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331(a), 2201, and 2202 and 2 U.S.C. §437h.

5. Pursuant to 2 U.S.C. §437, Plaintiffs respectfully request expedited consideration of the questions presented and expedited certification of those questions to the United States Court of Appeals for the District of Columbia Circuit (*En Banc*).

Plaintiffs

6. Plaintiff, the Chamber of Commerce of the United States of America ("the Chamber"), is a not-for-profit organization, exempt from the payment of Federal income taxes pursuant to 26 U.S.C. §§501(a), 501(c)(6)(1967) and is incorporated under the laws of the District of Columbia.

The Chamber is a voluntary association of more than 75,000 enterprises and organizations, including chambers of commerce and trade associations, representing businessmen and businesswomen throughout the United States. Over 71,000 corporations, partnerships, sole proprietorships, and professional people are members of the Chamber.

The members of the Chamber have voluntarily associated together in and through the medium of the Chamber in order to advance, promote and promulgate before the Legislative, Executive and Judicial Branches of the Federal Government the views of its members concerning the necessity for the maintenance of a strong and healthy private enterprise system in the United States. The Chamber also provides a forum for the consideration of national and international subjects having significant implications for its members and the private enterprise system. And, through bringing to bear informed judgment and opinion, the Chamber develops and seeks implementation of policy recommendations to guide the process of decision-making on such subjects. To advance and achieve these goals, the Chamber has established and administers, and pays the costs of "solicitation" activities of voluntary contributions to the National Chamber Alliance for Politics.

7. Plaintiff, the National Chamber Alliance for Politics (the "Alliance"), is a duly constituted separate segregated

fund within the meaning of 2 U.S.C. §441(b)(2)(C) and is registered with the Federal Election Commission pursuant to 2 U.S.C. §443.

8. The Alliance was established and is administered by the Chamber to promote and facilitate the accumulation of voluntarily contributed funds. The Alliance uses these funds, which are contributed by widely disparate sources to underwrite the making of "in-kind" contributions (that is, contributions of goods and services, not money) and independent expenditures. These "in-kind" contributions and expenditures are made with respect to election contests where there exist opportunities to elect or re-elect to the United States Senate or the United States House of Representatives individuals who have demonstrated or who are deemed likely to demonstrate support for the philosophy and positions espoused by the Chamber and its members.

These "in-kind" contributions and independent expenditures (hereinafter collectively referred to as the programs of the Alliance) include, but are not limited to, communications with the members of the electorate, for the purpose of influencing the nomination or election of persons to Federal office. Such communications may be verbal or written, and include, but are not limited to, letters, speeches, position papers, and the organization and conduct of meetings through which persons sharing similar philosophies are called upon to take single or collective action in support of or in opposition to candidates for Federal office.

9. Plaintiff, Richard L. Lesher, is President of the Chamber and Chairman of the Alliance and is eligible to vote for the Office of President of the United States. In furtherance of his obligations and responsibilities as Chairman of the Alliance, he did and does coordinate and actively participate in the process of "soliciting" contributions to the Alliance to the extent such "solicitations" are permitted by 2 U.S.C. §441b.

10. Plaintiff, John A. Kochevar, is Manager, Public Affairs Department of the Chamber, is Treasurer of the Alliance and is eligible to vote for the Office of President of the United States. In furtherance of his obligations and responsibilities as Treasurer of the Alliance, he did and does actively participate in the process of "soliciting" contributions to the Alliance to the extent such "solicitations" are permitted by 2 U.S.C. §441b. In addition, he has supervisory responsibility for the development, preparation, and execution of the "solicitation" program, for the conduct of the programs of the Alliance through which "in-kind" contributions and independent expenditures are made, and for the coordination of all these programs.

11. Plaintiff, Fred Radewagen, is Director, Governmental and Political Participation Programs of the Chamber and is Executive Director of the Alliance and is eligible to vote for the Office of President of the United States. In furtherance of his responsibilities and obligations as Executive Director of the Alliance, he did and does actively participate in the process of "soliciting" contributions to the Alliance to the extent such "solicitations" are permitted by 2 U.S.C. §441b, and is directly responsible for the conduct of the programs of the Alliance through which "in-kind" contributions and independent expenditures are made. In addition, he has supervisory responsibility for the development, preparation, and execution of the "solicitation" program and for the coordination of all these programs.

12. Plaintiff, Robert A. Roland, is a member of the Board of Directors of the Chamber and a member of the Advisory Council of the Alliance, and is eligible to vote for the Office of the President of the United States. He receives no compensation for any of his activities undertaken on behalf of the Chamber or the Alliance; he voluntarily participates in the program of the Chamber and the Alliance because he personally believes in many, if not all, of the purposes, goals, and philosophy espoused by the Chamber and the Alliance, and chooses to be associated with them. In furtherance of his

voluntarily assumed responsibilities as a member of the Advisory Council of the Alliance, he did and does actively participate in the process of "soliciting" contributions to the Alliance to the extent such "solicitations" are permitted by 2 U.S.C. §441b.

13. In order to finance the Plaintiffs' activities which provide a focal point for political association, the Plaintiffs "solicit" voluntary contributions from various sources. Funds realized from this "solicitation" activity constitute the primary source of revenue for the programs of the Alliance. The ability and the extent to which the Plaintiffs can conduct the programs of the Alliance are directly related to the extent to which Plaintiffs can "solicit" contributions.

14. The "solicitation" activities of the Plaintiffs are nonpartisan in nature and consist not merely of a request for contributions, but more importantly consist of and are directed to the dissemination of ideas, opinions, and political information about matters of vital national concern. Through these "solicitation" activities, by both the written and spoken word, the Plaintiffs discuss those political, social and economic forces, events and decisions which have significant implications for the private enterprise system and those who share or believe in the benefits of this economic philosophy. Through their "solicitation" activities, the Plaintiffs discuss the programs of the Alliance as a means of affecting and helping to shape the process of decision-making on such matters. In short, through their "solicitation" activities, Plaintiffs state the rationale for making voluntary contributions to the Alliance as a means of voluntarily associating with persons of similar social and political beliefs and of furthering the common goals and objectives shared by the Plaintiffs and those who read or hear the Plaintiffs' views. The activities of the Plaintiffs described above are protected by the First Amendment guarantees of freedom of speech and freedom of association.

15. The voluntary contributions to the Alliance made by those to whom the Plaintiffs' "solicitation" activities are

directed manifest their agreement with and support for the philosophy espoused by the Plaintiffs and make possible the conduct of the programs of the Alliance through which this philosophy may be communicated to the electorate. The ability of the Plaintiffs to communicate their words, thoughts and ideas to a broadly based audience for the purpose of "soliciting" their financial assistance as an expression of their support for the Plaintiffs' announced political philosophy and goals is significantly circumscribed by certain provisions of the Act, which limit the Plaintiffs' "solicitation" activities only to those few categories of solicitees enumerated in the Act. This unlawful restriction on Plaintiffs' "solicitation" activities likewise abridges the right and ability of those potential solicitees not enumerated in the Act to associate with the Plaintiffs by making voluntary contributions to the Alliance.

The Federal Election Campaign Act, as amended.

16. Pursuant to 2 U.S.C. §441b(a) of the Act, no corporation may make a contribution or expenditure in connection with Federal elections. Section 441b(b)(2), however, excludes certain activity from the definition of a contribution or expenditure. Thus, pursuant to section 441b(b)(2)(C), a corporation, membership organization, cooperative or corporation without capital stock may expend its own funds to establish, administer, and solicit voluntary contributions to a separate segregated fund ("political action committee" or "PAC"). The funds of the PAC may be used for "political purposes" including the making of "in-kind" contributions to and independent expenditures on behalf of candidates for Federal office.

17. However, the right to solicit voluntary contributions is significantly and unconstitutionally circumscribed by the Act, in that only such categories of persons who are specifically enumerated may be solicited, to the exclusion of all others. In particular, the Act forbids a corporation, membership organization, cooperative, corporation without capital stock, or a trade association — or a PAC established by any of the foregoing — from soliciting funds from a PAC

established by any other individual, organization, or group of individuals or organizations.

Accordingly, Section 441(b)(4)(A) states:

> . . . it shall be unlawful —
>
> (1) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive and administrative personnel and their families . . .

Similarly, Section 441(b)(4)(C) states:

> This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

And, finally, Section 441b(b)(4)(D) states:

> This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

18. Notwithstanding the prohibitions against solicitation detailed in paragraph 17, the Act specifically permits contributions from one PAC to another PAC, irrespective of who may have established the PAC, subject to a maximum dollar limitation of $5,000 per calendar year. 2 U.S.C. §441a(a)(2)(C).

19. Contributions from one PAC to another made pursuant to 2 U.S.C. §441a(a)(2)(C) must be reported to the FEC by both the contributor PAC and the recipient PAC pursuant to the terms and conditions contained in 2 U.S.C. §434. Further, the Act specifically prohibits any contribution made in the name of another. 2 U.S.C. §441f.

20. Thus, the Act requires the disclosure of the source of contributions to a PAC, permits a PAC on its own initiative to contribute funds to any other PAC, but prohibits a corporation, membership organization, cooperative, corporation without capital stock, or trade association — or a PAC established by any of the foregoing — from soliciting such contributions.

Defendants

21. Defendant, the Federal Election Commission ("FEC" or "Commission"), was established by the Federal Election Campaign Act of 1971 (as amended in 1974 and 1976), 2 U.S.C. §437c, to administer, obtain compliance with, and formulate policy with respect to the Act and Chapters 95 and 96 of the Internal Revenue Code of 1954. 2 U.S.C. §437c(b)(1).

22. Defendant, Joan T. Aikens, is Chairman of the FEC. The instant case is brought against Chairman Aikens solely in her official capacity as a member of the Commission.

23. Defendant, Robert O. Tiernan, is Vice-Chairman of the FEC. The instant case is brought against Vice-Chairman Tiernan solely in his official capacity as a member of the Commission.

24. Defendants, Thomas E. Harris, Neil Staebler, William L. Springer, and Vernon W. Thompson are Commissioners of the FEC. The instant case is brought against these Commissioners solely in their official capacities as members of the Commission.

25. Defendant, J. Stanley Kimmitt, is the duly elected Secretary of the United States Senate and is pursuant to the Act, an *ex officio* member of the FEC. The instant case is brought against Mr. Kimmit solely in his official capacity as a member of the Commission.

26. Defendant, Edmund L. Henshaw, is the duly appointed Clerk of the United States House of Representatives and is, pursuant to the Act, an *ex officio* member of the FEC. The instant case is brought against Mr. Henshaw solely in his official capacity as a member of the Commission.

COUNT I

1-26. As Paragraphs 1-26 of Count I, Plaintiffs reallege and incorporate Paragraphs 1-26 of the Complaint.

27. The ability of Plaintiffs to engage in the "solicitation" activities described above, thereby providing a focal point for political association, is in large measure dependent upon Plaintiffs' ability to communicate information about their philosophy, goals and the programs of the Alliance with a broadly based audience. The corresponding ability of a broadly based audience to associate with Plaintiffs by the making of voluntary contributions to the Alliance is dependent upon their ability to receive information from the Plaintiffs about the Plaintiffs' philosophy, goals and the programs of the Alliance.

28. By depriving Plaintiffs of the ability freely to communicate with political action committees established and/or administered by corporations and other potential solicitees, Section 441b abridges:

(i) Plaintiffs' ability to communicate political thoughts and information;

(ii) Plaintiffs' ability to associate with those not enumerated in the Act;

(iii) The opportunity of those not enumerated in the Act for political association with the Plaintiffs by making voluntary contributions to the Alliance; and

(iv) The opportunity for political association between those who have contributed to the Alliance and those who have contributed to the political action committees of persons or entities not enumerated in the Act as permissible solicitees.

29. The harm wrought by Section 441b is actual and not speculative or hypothetical. Fearing the imposition of the civil and criminal sanctions contained in the Act, Plaintiffs have limited and continue to limit their "solicitation" activities only to members of the Plaintiff Chamber pursuant to the restrictions and limitations contained in Section 441b. Plaintiffs desire to communicate with political action committees in the manner described above but have not done so because of the prohibitions contained in Section 441b and their fear of the imposition of the civil and criminal sanctions contained in the Act.

30. Further, Plaintiff Roland, and other individuals who have volunteered their assistance to the Alliance and the Chamber have been specifically advised by Plaintiffs Kochevar and Radewagen that they may not communicate with political action committees in the manner described above. But for Section 441b, and his fear of the imposition of the civil and criminal penalties contained in the Act, Plaintiff Roland would undertake such communications to political action committees.

31. Title 2 U.S.C. §441b is an unconstitutional abridgment of Plaintiffs' rights of freedom of speech and association in that:

(a) Section 441b abridges Plaintiff's ability to communicate political thoughts and information;

(b) By impermissibly circumscribing Plaintiffs' freedom of speech and association, Section 441b abridges Plaintiffs' ability to associate with those not enumerated in the Act;

(c) By impermissibly circumscribing Plaintiffs' freedom of speech and association, Section 441b abridges the opportunity for those not enumerated in the Act for political association with Plaintiffs by making voluntary contributions to the Alliance;

(d) By impermissibly circumscribing Plaintiffs' freedom of speech and association, Section 441b deprives Plaintiffs of the right to associate freely with a substantial number of persons who have or may have an affinity of interest with Plaintiffs, and thereby abridges the rights of those persons to associate with Plaintiffs toward common political ends;

(e) By impermissibly circumscribing Plaintiffs freedom of speech and association, Section 441b abridges the opportunity for political association between those who have contributed to the Alliance and those who have contributed to other political action committees; and,

(f) By impermissibly circumscribing Plaintiffs' freedom of speech and association, Section 441b abridges Plaintiffs' ability to make statutorily permissible contributions and expenditures on behalf of candidates of their choice.

WHEREFORE, Plaintiffs respectfully pray for entry of judgment declaring 2 U.S.C. §441b unconstitutional, both facially and as applied to the Plaintiffs, in violation of the First Amendment to the Constitution of the United States in that Section 441b impermissibly prohibits Plaintiffs from "soliciting" contributions from separate segregated funds. Plaintiffs also pray for entry of judgment permanently enjoining the enforcement of 2 U.S.C. §441b with respect to the aforedescribed "solicitation" activities, and for such other relief as is just and proper.

COUNT II

1-26. As paragraphs 1-26 of Count II, Plaintiffs reallege and incorporate paragraphs 1-26 of the Complaint.

27. Neither Section 441b nor any other provision of the Act directly restricts the "solicitation" activities of candidates for Federal office or their authorized principal campaign committees, as that term is defined in 2 U.S.C. §432(e).

28. Neither Section 441b nor any other provision of the Act directly restricts the "solicitation" activities of "independent" political action committees; that is, political action committees which are established and/or administered independently of any corporation, trade association, membership organization, cooperative or corporation without capital stock.

29. Plaintiffs are informed and believe that Plaintiffs Kochevar and Radewagen have received in excess of thirty (30) communications from candidates for Federal office or their principal campaign committees "soliciting" contributions from the Alliance.

30. Plaintiffs are further informed and believe that "independent" political action committees have "solicited" and presently do "solicit" political contributions from separate segregated funds.

31. But for the restrictions imposed by Section 441b, and their fear of the imposition of the civil and criminal sanctions contained in the Act, Plaintiffs would also "solicit" contributions from separate segregated funds.

32. Section 441b arbitrarily, capriciously and invidiously discriminates against Plaintiffs in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, Plaintiffs respectfully pray for entry of judgment declaring 2 U.S.C. §441b unconstitutional, both facially and as applied to the Plaintiffs, in violation of the Fifth Amendment to the Constitution of the United States in

that Section 441b impermissibly prohibits Plaintiffs from "soliciting" contributions from separate segregated funds. Plaintiffs also pray for entry of judgment permanently enjoining the enforcement of 2 U.S.C. §441b with respect to the aforedescribed "solicitation" activities, and for such other relief as is just and proper.

Respectfully submitted,

/s/ STANLEY T. KALECZYC
/s/ FREDERICK J. KREBS
/s/ STEPHEN A. BOKAT

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APPENDIX F

NATIONAL CHAMBER ALLIANCE FOR POLITICS
P.O. Box 1728, Washington, D.C. 20013

Dr. Richard L. Lesher, Chairman

Dear Friend of American Enterprise:

How much longer can we hold out against the relentless assault on our American economic system — a system which has provided well for you and your family?

The fact is, a well organized and well funded coalition of forces is determined to elect people to Congress who will further restrict competitive enterprise.

How does this affect you?

Economic freedom is one of our fundamental freedoms, inextricably linked to other cherished personal liberties. Yet, bit-by-bit, we are losing that essential freedom. Even as you read this, the government is applying additional restrictions to your right to choose:

*What kind of job you have

*Where you work

*Who you hire

*Who you sell to

*What you invest in

What can you do?

THE MOST DIRECT WAY TO PROTECT YOURSELF AND THE THINGS YOU BELIEVE IN IS TO CHANGE THE MAKEUP OF THE CONGRESS.

You and I know this will be a big job and big jobs require big efforts. It is for this reason that I would like to tell

you about a new organization that will help individuals like you to make a difference in Congress.

What is this new organization?

As president of the Chamber of Commerce of the United States, I am pleased to tell you that, in compliance with the Federal Election Law, we have formed a political action fund called the National Chamber Alliance for Politics (NCAP).

This organization is sponsored by the Chamber of Commerce of the United States, but will operate separately with strictly voluntary contributions from individuals. These voluntary contributions will be used for partisan activities in federal elections.

What makes NCAP different?

You may be familiar with other political action funds that give dollars to candidates and campaign committees. *NCAP will not provide direct monetary contributions to candidates or campaign committees.*

Instead, your contribution to NCAP will provide services and materials which will supplement dollar contributions and complement the candidates' campaign activities. This means that through NCAP your dollars can provide a deserving candidate with the kind of political know-how and national support that he or she has never before been able to have.

The key to all of this is your contribution.

What kinds of services and materials will NCAP provide?

- A clearinghouse of candidate and election information gleaned from nationwide research.
- Trained personnel to help organize and instruct campaign leaders and workers in selected races.
- Experts to advise candidates on media relations techniques.

- Assistance in polling, speechwriting and advertising for candidates.
- Research on issues, opposition candidate positions, incumbent voting records.
- Economic forecasts for specific congressional districts.

ALL OF THESE ACTIVITIES MUST BE FINANCED FROM VOLUNTARY FUNDS. YOU CAN BE PART OF THE SUCCESS OF THIS EFFORT BY GIVING YOUR CONTRIBUTION AND COMMITMENT *NOW*.

How can you join?

I urge you to complete the enclosed remittance form and return it, along with your *personal* check, in the postage free envelope provided. *THE LAW FORBIDS CORPORATE CHECKS.*

Please send check and form to:

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APPENDIX G

Constitutional, Statutory and Regulatory Provisions Involved

United States Constitution

Article III

SECTION. 2.[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATUTES

2 U.S.C. § 437f Advisory opinions

(a) *Requests by persons, candidates, or authorized committees; subject matter; time for response.*

(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.

(2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidatte, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

(b) *Procedures appliable to initial proposal of rules or regulations, and advisory opinions.* Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title. No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.

(c) *Persons entitled to rely upon opinions; scope of protection for good faith reliance.*

(1) Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—

(A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and

(B) any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.

(2) Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in accordance with the provisions of paragraph (1) and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act or by chapter 95 or chapter 96 of title 26.

(d) *Requests made public; submission of written comments by interested public.* The Commission shall make public any request made under subsection (a) of this section for an advisory opinion. Before rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public.

2 U.S.C. § 437g Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or

chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a

restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member of employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i), the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, purusuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provison of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) may incorporate a violation of section 441c(b), 441f or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant

and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether —

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

2 U.S.C. § 437h Judicial review

(a) The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of the Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

(b) Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Such appeal shall be brought no later than 20 days after the decision of the court of appeals.

(c) It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a).

2 U.S.C. §441b. Contributions or expenditures by national banks, corporations, or labor organizations.

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connec tion with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidates, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 791(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include —

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful —

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful —

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so dsigned that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

REGULATIONS

11 C.F.R. 114.7j

A membership organization, including a trade association, cooperative, or corporation without capital stock or a separate segregated fund established by such organization may not solicit contributions from the separate segregated funds established by its members. The separate segregated fund established by a membership organization, including a trade association, cooperative, or corporation without capital stock may, however, accept unsolicited contributions from the separate segregated funds established by its members.

Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-349

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL CHAMBER ALLIANCE FOR POLITICS, ET AL., PETITIONERS,

v.

FEDERAL ELECTION COMMISSION, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OCTOBER 6, 1980

QUESTIONS PRESENTED

(1) Whether the courts below properly concluded that petitioners' challenge to the constitutionality of certain provisions of the Federal Election Campaign Act presented no case or controversy sufficiently ripe to invoke the declaratory powers of federal courts where petitioners made no showing that they would engage in conduct restricted by those provisions and where the Commission had taken no steps to enforce those provisions against petitioners.

(2) Whether the courts below properly concluded that petitioners may not invoke the special jurisdictional provisions of the Federal Election Campaign Act where petitioners presented no case or controversy sufficiently ripe to invoke the declaratory powers of federal courts.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Federal Election Commission ("Commission" or "FEC") requests that the petition for writ of certiorari filed by petitioners to review the judgment of the United States Court of Appeals for the District of Columbia Circuit be denied.

OPINIONS BELOW

The opinion of the court of appeals, which is not yet reported, appears in the appendix to petitioners' brief

("Pet. App.") at la. The orders of the court of appeals denying a petition for rehearing and rehearing *en banc* are set forth at Pet. App. at 38a–39a. The memorandum opinion and order of the district court are unpublished and appear at Pet. App. at 40a–42a. The opinion of the district court in *Martin Tractor Co.* v. *Federal Election Commission*, reported at 460 F. Supp. 1017 (D.D.C. 1978), ("*Martin Tractor*") is reprinted in the Commission's Appendix ("App."), *infra*.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1980. On June 10, 1980, the court denied petitioners' petition for rehearing and rehearing *en banc*. The jurisdiction of the Court is invoked under 28 U.S.C. §§ 1254 and 2101(c).

COUNTERSTATEMENT OF THE CASE

On July 20, 1978, petitioners brought suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief from certain provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*, ("FECA" or "the Act"), and requested expedited review pursuant to 2 U.S.C. § 437h(a). Their complaint alleged that 2 U.S.C. § 441b unconstitutionally infringes upon rights guaranteed them by the first and fifth amendments of the Constitution of the United States, insofar as these provisions restrict "solicitation" of contributions to, and by, certain "separate segregated funds" (or political action committees)

maintained by trade associations.[1] Specifically, the Chamber, the Alliance and their officers Lesher, Kochevar and Radewagen, alleged that they "desire to communicate with political action committees" or, in the case of petitioner Roland that he "would . . . undertake communications to political action committees."[2] Petitioners did not define with any precision the form, content, method, place or frequency of those communications.[3]

It is undisputed that none of the petitioners herein has ever requested or received an advisory opinion from the Commission as to the application of 2 U.S.C. § 441b to specific activities petitioners may wish to undertake. Nor is it disputed that the Commission has taken no steps to enforce § 441b against any of the petitioners.

On November 22, 1978, the district court dismissed the complaint because petitioners presented no case or controversy sufficiently ripe for adjudication in that they failed to show any threat of interference beyond that implied by the existence of the law and the regulations. Pet. App. at 41a. The court referred to its opinion concerning nearly identical issues in *Martin Tractor* issued approximately two weeks earlier for a fuller explanation of its decision.[4] Applying the tests

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[1] The provisions of 2 U.S.C. § 441b are set forth at Pet. App. at 70a–74a.

[2] *See* First Amended Complaint, paragraphs 29–30, Pet. App. at 52a.

[3] *See* First Amended Complaint, paragraphs 14 and 15, Pet. App. at 47a–48a.

articulated by this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) and *Gardner* v. *Toilet Goods Association*, 387 U.S. 167 (1967), the district court concluded in *Martin Tractor:*

> . . . first, that the issue framed by plaintiffs, is not readily amenable to judicial review, being uncertain as to both conduct and legal consequences and, secondly, that the harm in delaying review is minimal since plaintiffs have yet to take the relatively costless steps which would permit an initial determination of the legality of their intended conduct.

App. at 9a. The district court also concluded that petitioners herein, like the plaintiffs in *Martin Tractor*, were not among the entities or individuals entitled to invoke the court's jurisdiction under 2 U.S.C. § 437h(a). Pet. App. at 41a; App. at 3a–5a. Accordingly, the district court declined to reach the merits of petitioners' constitutional claims.

On November 29, 1978, petitioners noticed their appeal to the United States Court of Appeals for the District of Columbia Circuit. The court of appeals consolidated petitioners' case with *Martin Tractor*.

In an opinion dated May 8, 1980, the court of appeals affirmed the district court's conclusion that petitioners had failed to present a ripe case or controversy. The court rested its decision on numerous considerations. First, petitioners had made no showing

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[4]Only the granting of an extension of time in the briefing schedule at the request of one of the parties prevented decision of the two cases in tandem. *See* Pet. App. at 40a.

that the challenged provisions would proscribe the conduct in which they desire to engage. They did not specify the precise activities which they wish to undertake. Nor had they sought an advisory opinion from the Commission on the application, if any, of the challenged provisions to such conduct. Pet. App. at 33a–35a. Second, the Commission had taken no action to enforce these provisions against petitioners. Pet. App. at 34a–35a. Third, by reference to its discussion in the *Martin Tractor* case, the court deemed petitioners' case inappropriate for adjudication as a prudential matter, noting the importance of a complete and precise factual record where a federal court has been asked to review the constitutionality of an Act of Congress. Pet. App. at 9a. Finding no case or controversy present, the court declined to reach either the issue of the applicability of 2 U.S.C. § 437h(a) or the merits of petitioners' constitutional arguments. Pet. App. at 36a–37a.

On June 10, 1980, the court of appeals denied petitioners' motion for rehearing. Pet. App. at 38a. Also on June 10, 1980, the *en banc* court of appeals denied petitioners' suggestion for rehearing *en banc*. Pet. App. at 39a.

REASONS WHY THE WRIT SHOULD BE DENIED

The courts below correctly concluded that petitioners had failed to present a case or controversy sufficiently ripe for adjudication as required by Article III of the Constitution of the United States. These decisions are consistent with well-established principles of

justiciability as articulated by this Court and lower federal courts. Further review is not warranted.

(1) Both the district court and the court of appeals fully considered the jurisdictional issues in this case. Applying well-established precedent of this Court, including those cases involving facial first amendment attacks on the constitutionality of statutes or regulations,[5] both courts concluded that this case presented none of the critical indicia of a justiciable controversy.[6]

As this Court has repeatedly held, to establish a justiciable claim under Article III, a plaintiff must allege "such a personal stake in the outcome as to assure . . . concrete adverseness . . . ." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Further, the plaintiff must allege that he has sustained or is immediately in danger of sustaining a direct injury as the result of the challenged executive or legislative action. *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972). "A hypothetical threat is not enough." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947). As the court of appeals stated:

> If the injury be a future one, the injury must be reasonably certain and clearly describable for the

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[5] *See* Pet. App. at 10a–12a for the court of appeals' discussion of principles of facial adjudication. Contrary to petitioners' assertions, Pet. at 10, the court of appeals specifically analyzed the most recent decisions of the Court applicable to this case and, correctly applying the precedents therein, found that even "the special status of facial first amendment attacks on the constitutionality of statutes or regulations" could not render "the case in its present posture . . . ripe for decision." Pet. App. at 10a, 16a.

[6] After a complete analysis of the factual posture of the *Martin Tractor* case, the court of appeals found that "the *National Chamber* case presents an even more elusive factual context than that presented in *Martin Tractor*." Pet. App. at 33a.

> action to be deemed "ripe" for adjudication. The mere possibility of prosecution or the possibility that sanctions authorized under a general regulatory regime may be imposed when the regulatory agency is confronted with specific facts developed in some future agency proceeding is insufficient. [footnote omitted].

Pet. App. at 8a. The court of appeals correctly concluded, applying precedents established by the Court,[7] that petitioners' failure to define the form, content, method, place or frequency of their desired solicitation activities, except in broad terms that merely paraphrased the general language of FECA and the Commission's regulations, necessitated dismissal of the complaint as non-justiciable. *See* First Amended Complaint, paragraphs 14–15, Pet. App. at 47a–48a.[8]

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[7] Petitioners' argument that a proper application of the Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), requires a finding that their complaint should not have been dismissed as non-justiciable is without merit. The court of appeals recognized what the Court observed in *Buckley*—"that '[p]roblems of prematurity and abstraction' . . . may prevent adjudication in all but the exceptional case"—and found no "urgency of decision in this case that outweighs the inadvisability of premature constitutional adjudication . . . ." Pet. App. at 26a, 27a, *quoting Buckley* v. *Valeo*, 424 U.S. at 114.

[8] Petitioners intimate that they have presented a ripe case or controversy by "[making] part of the record below" a "sample solicitation letter" whose contents "typifies the communication through which Petitioners would communicate . . . ." Petition at 3, 8; Pet. App. at 56a–59a. Such facts were not, however, alleged. Rather, the "sample" letter was merely appended to their response to the Commission's motion to dismiss their complaint and was properly disregarded by the district court pursuant to Federal Rule of Civil Procedure 12(b). Even if such facts had been alleged in petitioners' complaint, the tenuous posture in which petitioners even now present them sheds little light on the actual conduct they seek to undertake.

As the court of appeals observed, a determination as to whether specific activity or conduct is a "solicitation" pursuant to these provisions is an intensely factual one. Pet. App. at 16a–22a.[9] Should petitioners in fact decide to engage in particular solicitation activity, the court advised that "[w]hen a means like the [Commission's advisory opinion procedure] is available to reduce uncertainty or narrow the statute's reach and that means can be pursued at little risk to the rights asserted," any First Amendment chill is reduced. Pet. App. at 22a. 2 U.S.C. § 437f. The Court noted that FECA provides that any person may request an advisory opinion from the Commission, that the Commission must render such an opinion within 60 days of the request, and that a person receiving an opinion from the Commission may rely on it as "a defense to criminal prosecution or civil suit." Pet. App. at 21a. The Court should recognize, as did the courts below, that other organizations similar to appellants have successfully used the Act's advisory opinion procedure to determine whether the § 441b solicitation restrictions would apply to their specific intended conduct. *See* Pet. App. at 29a–30a. Petitioners, however, instead of utilizing the Commission's advisory opinion procedure, asked the district court to render an advisory opinion on the facial constitutionality of the Act's limitations on trade association solicitations of political contribu-

[9] *See, e.g.*, *Sargent* v. *Genesco*, 492 F.2d 750, 767 (5th Cir. 1974) (meaning of "solicitation" under the Securities Exchange Act). *See also NLRB* v. *Baptist Hospital*, 442 U.S. 773 (1979); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945), (lawfulness of employer-imposed bans on membership "solicitation" by unions).

tions. Federal courts have consistently refused to render such advisory opinions since President Washington requested that Chief Justice Jay construe certain federal laws and treaties in 1793. 3 *Correspondence and Public Papers of John Jay* 486 (H. Johnston ed. 1893). Similarly, the courts below correctly refused to do so.[10]

To the extent that petitioners challenge § 441b "as applied" to them, the Commission can only reiterate that it has neither attempted to nor even threatened to apply that provision against them. Petitioners themselves do not so much as threaten to violate the Act. They have never presented an advisory opinion request to the Commission regarding the application of § 441b to specific proposed conduct. The Commission has never informed them that § 441b would prohibit such conduct. Accordingly, petitioners face no "Hobson's Choice of either knowingly violating a statute with civil and criminal penalties or undertaking a useless administrative act." Petition at 17. By refusing to engage in the "useless" act of invoking the Commission's advisory opinion mechanism, Petition at 14, petitioners have opted to forego the opportunity of applying for a ruling which might permit them to accom-

[10] Requiring that petitioners define their intended activity within the Act's administrative structure may well obviate the necessity of seeking a judicial ruling on the constitutionality of the manner in which the Act may or may not affect those activities. *See, e.g., John B. Anderson* v. *Federal Election Commission*, Civ. Action No. 80–1911 (D.D.C. Sept. 9, 1980) (three-judge court), in which the Commission's favorable response to an advisory opinion request, submitted by plaintiffs after initiating litigation, resulted in the court's dismissal on the grounds of mootness.

plish their objectives in a manner consistent with FECA without risking a violation thereof. Thus, any "Hobson's Choice" is a self-imposed one. Indeed, the district court in *Martin Tractor*, applying the tests of justiciability articulated by this Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), concluded that any harm in delaying review was minimal since petitioners have yet to request an advisory opinion from the Commission, "a relatively costless [step] which would permit an initial determination of the legality of their intended conduct." App. at 9a. Similarly, the court of appeals noted that petitioners "have not communicated with the FEC concerning the activity they would like to undertake" or requested an advisory opinion, a procedure which "can be pursued at little risk to the rights asserted." Pet. App. at 22a, 34a.

Insofar as petitioners challenge § 441b facially, they essentially argue that a justiciable controversy is present because the first amendment prohibits any constraint whatsoever upon the solicitation of contributions, relying on this Court's ruling in *Village of Schaumberg* v. *Citizens for a Better Government*, 444 U.S. 620 (1980).[11] The court of appeals, however, dis-

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[11] To the contrary, *Schaumberg* defined the issue therein as "whether the Village [had] exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech." 444 U.S. at 633. *Accord*, *Central Hudson Gas and Electrical Corporation* v. *Public Service Commission*, ___ U.S. ___, 100 S.Ct. 2343 (1980) ("The First Amendment . . . protects commercial speech from unwarranted governmental regulation."); *Consolidated Edison Co.* v. *Public Service Commission*, ___ U.S. ___, 100 S.Ct. 2326 (1980) ("We must consider whether the State can demonstrate that its regulation is constitutionally permissible."). In any event, the fail-

tinguished *Schaumberg* from petitioners' case noting that in *Schaumberg* "[t]he types of activity in which the organization had engaged and planned to engage were alleged with some particularity . . . and the Village's intention to enforce the ordinance against the complaining organization was clear." Pet. App. at 24a (citations omitted). Indeed, *Schaumberg* itself reinforces the requirement of a ripe case or controversy even in the context of a facial first amendment challenge:

> *Given a case or controversy*, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court.

444 U.S. at 634 (emphasis added).[12]

(2) Despite their failure to present a justiciable case or controversy, petitioners argue that the courts below, for prudential reasons, should have permitted petitioners to invoke the courts' jurisdiction pursuant to 2 U.S.C. § 437h(a). This Court, however, affirmed

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ure of petitioners to present the courts below with a ripe case or controversy precluded either court reaching the underlying merits of the complaint. Thus, the substance of petitioners' complaint as it may at some point be presented in the context of a case or controversy is not presently before the Court.

[12]The court also noted the factual posture of *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978)—one "submitted upon '66 paragraphs of stipulated facts and 70 pages of supporting documents relevant to those stipulations.' " Pet. App. at 24a. Petitioners herein failed even to provide the courts below with an advisory opinion rendered by the Commission which would have at the very least more precisely defined petitioners' intended conduct and FECA's application thereto.

Clark v. *Valeo*, 559 F.2d 642 (D.C. Cir. 1977) (*en banc*), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977), in which the court of appeals indicated that even when a complaint is governed by the Act's special review provisions, a live case or controversy might be dismissed for prudential reasons. Judge Leventhal, concurring in *Clark*, would have rested his dismissal of that case entirely on prudential grounds.[13] *Id.* at 657. Judge Robinson, dissenting, disagreed, arguing that Congress, in enacting 2 U.S.C. § 437h(a), and the Supreme Court, in its decision in *Buckley* v. *Valeo*, *supra*, had eliminated from adjudication under § 437h(a) the extraconstitutional aspects of "justicability." 431 U.S. at 669. The majority took issue with Judge Robinson's dissent:

> To the extent [Judge Robinson's] language may be read as suggesting a view that Congress may "command" the judiciary to act contrary to the rules relative to ripeness the Supreme Court has developed "for its own governance in the cases confessedly within its jurisdiction," Ashwander v. Tennessee Valley Authority, 297 U.S. 288 . . . (Brandeis, J., concurring), we respectfully disagree.

Id. at 650 n. 11.[14]

To the extent that the court of appeals below may have rested its conclusion on prudential aspects of the

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[13] Judge Leventhal was a member of the court of appeals panel and heard these cases through oral argument. *See* Pet. App. at 2a.

[14] The district court below held that, in any event, none of the petitioners herein were entitled to invoke the review provision of 2 U.S.C. § 437h(a) as they are not among the entities enumerated in that provision. Pet. App. at 41a, App. at 3a–5a.

ripeness doctrine, such considerations were well-founded. As the court observed:

> Because of the " 'great gravity and delicacy' of [the courts'] function in passing upon the validity of an act of Congress," the need is manifest for a "full-bodied record" in such adjudication.

Pet. App. at 9a (citations omitted). In *United States* v. *UAW*, 352 U.S. 567 (1957), a case which involved an alleged violation of the statutory predecessor of the provisions at issue here, the Court emphasized the importance of a detailed factual record upon which a court might frame, limit or avoid a constitutional decision, noting that the constitutionality of the statute should not be considered "unless absolutely necessary to a decision of the case." *Id.* at 590, quoting *Burton* v. *United States*, 196 U.S. 283, 295 (1905).[15] Similarly, the court of appeals concluded that other cases in which this Court has reached the merits of facial first amendment challenges have presented factual situations sufficiently developed to reveal the contours of the parties' dispute. Pet. App. at 23a-26a. Here, however, petitioners request such an adjudication upon a barren record.

Finally, petitioners' reliance upon *Buckley* v. *Valeo*, *supra*, is misplaced. In *Buckley*, this Court acknowledged that, "ripeness is peculiarly a matter of timing."

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[15] *See also Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972); *United States* v. *CIO*, 335 U.S. 106 (1948). Indeed, as the court of appeals pointed out, petitioners conceded in their brief to the court that "[c]entral to the Supreme Court's exegesis of the ripeness doctrine is the insistance [sic] on a sufficiently defined record to insure informed and appropriately narrow adjudication." Pet. App. at 10a.

Id. at 114. Noting that the Court in *Buckley* was confronted with fundamental challenges to the election laws just as they were being put into operation for the 1976 elections, the court of appeals correctly concluded that, "the 'question of timing' before the Supreme Court in the *Buckley* case can hardly be likened to the one before us now." Pet. App. at 27a.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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OCTOBER 6, 1980

APPENDIX

United States District Court,
District of Columbia,
Civil Division.

Nov. 8, 1978.

Civ. A. No. 78-1259.

MARTIN TRACTOR COMPANY ET AL., PLAINTIFFS,

v.

FEDERAL ELECTION COMMISSION ET AL.,
DEFENDANTS.

Edward A. McCabe, John G. DeGooyer, Mark Sullivan, III, Anthony J. Thompson, Hamel, Park, McCabe & Saunders, Washington, D.C., for plaintiffs.

William C. Oldaker, Charles N. Steele, Kathleen Imig Perkins, Federal Election Commission, Washington, D.C., for defendants.

MEMORANDUM

OBERDORFER, *District Judge.*

I.

Three corporations, their political action committees, executives of two of them and a non-salaried employee of one of them here sue the Federal Election

Commission and its members for a declaratory judgment that one section of the Federal Election Campaign Act of 1971, as amended in 1976, 2 U.S.C. § 431 *et seq.*, (the Act) violates rights guaranteed to them by the First and Fifth Amendments of the Constitution. The alleged violations result from a threat, apparent on the face of § 441b of the Act, that if corporate and executive plaintiffs sought voluntary contributions to a political fund from hourly employees orally and in writing, on or off the corporation's premises, more than twice a year, they could be punished by fine and imprisonment. This threat has allegedly caused these plaintiffs to limit their exercise of their constitutional right to seek such voluntary contributions by communicating with hourly employees and concurrently impinged upon the right of the hourly employee plaintiff to receive such communication. Plaintiffs also seek injunctive relief to prevent enforcement of § 441b and the regulations pursuant thereto.

Defendants have moved to dismiss this complaint for lack of jurisdiction over the subject matter or for failure to state a claim upon which relief can be granted. Recognizing that the spirit of the Act requires prompt Court attention to constitutional questions raised about it,[1] and also recognizing the possible need of the parties for prompt action by this Court in order to expedite appeal from whatever decision it might make, the defendants' motion to dismiss was granted on October 18, 1978, with an indication that an explanatory memorandum would be forthcoming promptly.

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[1] *See* 2 U.S.C. § 437h(a), discussed further below.

The decision to dismiss the complaint was based upon the Court's conclusion, first, that plaintiffs may not invoke the statutory provision for judicial review provided in 2 U.S.C. § 437h and, secondly, that even if they qualified under that section, they presented as yet no case or controversy sufficiently ripe to invoke the declaratory powers of a federal court. A brief outline of the statutory scheme for enforcement written into the Act by Congress is necessary background to those conclusions.

In general the statute contemplates that defendants should investigate any complaint about violation of the Act in confidence and allow any person there charged a reasonable opportunity to respond; 2 U.S.C. § 437g. The Court accepts as binding upon the FEC its statement that a party may raise any defenses or arguments during such proceedings, including constitutional ones; Brief at 8. If the defendants later determine that there is reasonable cause to believe that a violation either has occurred or is threatened, they must attempt informal resolution of that alleged or threatened violation for at least thirty days. If the informal resolution fails, defendants may file a civil enforcement action in a federal district court; if they find that a knowing and willful violation has occurred, the defendants may refer the matter to the Attorney General who may or may not initiate criminal prosecution.

II.

[1] Plaintiffs claim that they are entitled to invoke the Court's jurisdiction under a unique provision of the Act which authorizes particular persons to sue "for de-

claratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act." 2 U.S.C. § 437h(a). Section 437h(a) had the purpose and effect of expediting judicial review of questions raised in Congress about the constitutionality of particular provisions of the Act so that these questions could be authoritatively resolved before the Presidential Election of 1976. *See* Remarks of Senator James Buckley, 119 Cong.Rec. S5707 (daily ed. April 10, 1974); *Buckley* v. *Valeo*, 424 U.S. 1, 11-12, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). Plaintiffs do not suggest that § 441b here at issue was among the provisions whose constitutionality was questioned in Congress. In any event, and crucial here, access to court pursuant to § 437h(a) was by its terms limited to "the Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President of the United States."

Neither the corporate plaintiffs nor the political action committees are in the category of entities or individuals entitled to invoke the Court's jurisdiction under § 437h(a). The decision to dismiss their complaint seems therefore to be *a fortiori*.

A closer question is raised with respect to the executive plaintiffs and the hourly employee plaintiff. The complaint alleges that they are eligible voters; the complaint puts at issue, however, not their rights as voters, but rather the constitutionality of the Act's provisions relating to communications between a corporation and its employees about voluntary contributions. Thus, as defendants persuasively contend, the individual plaintiffs do not sue in their individual

capacities to protect their individual rights to vote or even to make contributions. They sue to vindicate a claimed right of their corporate employer to influence its employees (including one of the plaintiffs) to make voluntary political contributions. While the question is not free from doubt, the Court has concluded that this kind of derivative right was not the constitutional right of "an individual eligible to vote" which Congress considered "appropriate" for vindication in a special declaratory judgment action under § 437h, particularly where, under the statutory scheme there is an alternative process for resolution of the substantive issue in the context of a particular transaction, *infra*.

III.

[2] The result would be no different if the Court assumed, contrary to the foregoing conclusion, that plaintiffs could qualify under § 437h. That section, while it may confer standing on certain classes, cannot by itself create a justiciable controversy. All actions brought under the statutory provisions for judicial review are subject to the requirements of "case and controversy" and "ripeness." *See United Public Workers* v. *Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *Muskrat* v. *United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911). Whether required by Article III of the Constitution or in part an expression of the discretion inherent in equity and declaratory judgment jurisdiction, these restrictions upon the jurisdiction of the federal courts are well established. Under the facts of this case, the Court concludes that there is at present no case or controversy sufficiently

ripe for declaratory action. Plaintiffs merely allege that they communicated more freely with employees about contributions before the Act became law and desire to resume the practice and would do so but for the Act. They have not, however, advised defendants of their desire to communicate with their employees differently from the times and manner prescribed by law, nor sought any ruling by defendants to accommodate that desire. Neither have defendants taken any steps to invoke the statutory enforcement procedures. Where then is the case or controversy?

Abbott Laboratories v. *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) establishes a test for determining whether action taken by an agency has created a sufficiently "ripe" controversy to permit granting of declaratory or injunctive relief. The challenge there was to a final action of the Federal Trade Commission in approving regulations which required drug manufacturers to print the "established name" of a drug in a specified typeface on any label or printed material, whenever it printed the "proprietary name" of that drug.

Noting that the rationale of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties," the Court set forth a twofold test involving the balancing of "the fitness of the issues for judicial decision" and the "hardship to the parties of

withholding court consideration." *Id.* at 149, 87 S.Ct. at 1515.

As to the first factor, the Court noted that the issue for review was a "purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used every time the proprietary name is employed." *Id.* In contrast in this case factual issues which have not yet been developed are central to evaluating the constitutionality of the challenged provisions. For example, whatever the First Amendment rights of corporations, *see First National Bank* v. *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), they are not without limits and have been long subject to regulation in the context of protecting employees from pressure from employers. *See NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969). The balancing of the interests of a corporation and its employees (as well as the rights of others in society which are sought to be protected by the provisions of the Act challenged here) requires a factual record. Such a record may be based upon actual conduct of the corporation since the provision was enacted, which conduct the Commission challenges, or upon a threat of such conduct sufficiently definite so that the Commission can determine whether it would violate the Act. Only such a record would permit a court confidently to evaluate, among other relevant factors, the extent to which the conduct resembles speech activity or nonspeech activity, the extent of the pressures the conduct exerts upon employees or others, and whether the corporation could accomplish its legitimate objec-

tives by alternative means consistent with the statute.[2]

In considering the fitness for judicial review, the *Abbott* Court also noted that there was no claim that further agency action would be contemplated. The Court found the regulations at issue to be "final agency action" within the meaning of 5 U.S.C. § 704. The ruling was "quite clearly definitive" with "no hint that this regulation is informal . . . or only the ruling of a subordinate official . . . ." *Id.*, 387 U.S. at 151, 87 S.Ct. at 1517. Here by contrast plaintiffs as of yet challenge no agency determination that their conduct violates or would violate the Act. The Court is required not only to speculate about the exact nature of plaintiffs' conduct, but also about whether in fact the FEC would find that conduct to violate the Act.

Turning to the second factor, the hardship of withholding court consideration until a later time, the *Abbott* Court noted that compliance would require petitioners to "change all their labels, advertisements, and promotional materials . . . and . . . invest heavily in new printing type and new supplies. The alternative to compliance . . . may be even more costly. That course would risk serious criminal and civil penalties . . . To require [plaintiffs] to challenge these regula-

[2] *See* Scarpf, "Judicial Review and the Political Question: A Functional Analysis," 75 *Yale L.J.* 517, 531 (1966): "[T]he Court [in *United Public Workers* v. *Mitchell, supra*] may well have regarded the constitutional balance between the political rights of civil servants and the legitimate public interest in a neutral civil service as an extremely close one, depending very much upon the actual scope of enforcement and upon the concrete nature of the activities against which sanctions were to be applied."

tions only as a defense to an action brought by the Government might harm them severely and unnecessarily." *Id.* at 152, 153, 87 S.Ct. at 1517.

By contrast, plaintiffs here face no Hobson's choice between costly compliance or the risk of serious criminal or civil penalties. Plaintiffs need not even engage in the conduct whose legality concerns them. There is no showing that they could not apply for and attempt to negotiate a ruling which would permit them safely to accomplish their objectives consistently with the Act. Moreover, the enforcement procedures of the Act may be triggered either by actual conduct or a genuine threat thereof. Even if they engage in such conduct, however, the enforcement procedure which is yet to be invoked contemplates mandatory conciliation before legal action may be taken. After conciliation has failed, both the conduct to be reviewed and the FEC's position with respect to that conduct would be far more concrete and susceptible to judicial scrutiny through a declaratory action.

To summarize the application of the *Abbott* test, then, the Court concludes, first, that the issue framed by plaintiffs is not readily amenable to judicial review, being uncertain as to both conduct and legal consequences and, secondly, that the harm in delaying review is minimal since plaintiffs have yet to take the relatively costless steps which would permit an initial determination of the legality of their intended conduct.

In the course of reaching these conclusions, the Court has also considered whether, in a case involving First Amendment rights which requires a sensitivity to "chilling effects," such effects may create a ripe con-

troversy at an earlier stage than in a case not involving First Amendment rights; *cf. Gardner* v. *Toilet Goods Association*, 387 U.S. 167, 187, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967) ("Where personal status or liberties are involved, the courts may well insist upon a considerable ease of challenging administrative order or regulations"). Although plaintiffs allege they did engage in solicitation which they have ceased since enactment of the Act, in light of the enforcement-cum-conciliation provisions of the statute and the minimal cost of triggering those provisions, any chilling effect is at present highly subjective and, as the Court concluded in *Laird* v. *Tatum*, 408 U.S. 1, 13–15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972), "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[3]

The conclusion that there is no controversy sufficiently ripe to invoke declaratory relief is further supported by *United Public Workers* v. *Mitchell*, *supra*, which itself involved First Amendment rights. There plaintiffs challenged provisions of the Hatch Act which forbade their participating in political campaign activities. The Court found it inadequate merely to "declare a desire to act contrary to the rule against political activity but not that the rule has been violated." *Id.*, 330 U.S. at 88, 67 S.Ct. at 563. "No threat of interference by the [Civil Service] Commission with

[3]There is no allegation here that plaintiff has sought through the enforcement procedures or otherwise to clear its intended conduct with the Commission and that the Commission has refused either to invoke those procedures or give informal approval. Use of the potential threat of those procedures as a "Sword of Damocles" might present a different case.

rights of these appellants appears beyond that implied by the existence of the law and the regulations." *Id.* at 91, 67 S.Ct. at 565. Justice Douglas' dissent in that case noted that the appellants' alternative of violating the rule would result in the loss of jobs, seniority and benefits; as noted above, by contrast, plaintiffs will suffer little harm, if any, should they be required to "ripen" their claims before seeking judicial review.

It is for these reasons that the Court granted defendants' motion to dismiss.

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